84-1572

No.

Office - Supreme Court, U.S.
FILED
APR 3 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1984

SYLVESTER MARX, Individually, and as a shareholder of Centran Corporation, on behalf of Centran Corporation and all others similarly situated,

Petitioner,

vs.

CENTRAN CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

DONALD WEISBERGER, *Counsel of Record*
Suite 1425 - 75 Public Square Bldg.
Cleveland, Ohio 44113
(216) 621-7113
Counsel for Petitioner

163 pp

QUESTIONS PRESENTED

1. Whether "...subject to law, all such incidential powers as shall be necessary to carry on the business of banking" of 12 U.S.C. 24 Seventh., are convenient for the use of the express power following therein, "...The limitations and restrictions herein contained as to dealing in, underwriting and purchasing for its own account, investment securities shall not apply to obligations of the United States, or general obligations of any State or of any political subdivision thereof", thereby authorizing interlocked directors of a national bank & bank holding company, subject only to the Comptroller of the Currency's regulation 12 C.F.R. 1.4, the unfettered right, without regard to the bank's capital & surplus, to buy for the bank's own account, 307 million dollars of long term United States, State and Municipal bonds and finance the entire payment thereof, with monies borrowed thereon, by the use of short term repurchase agreements and overnight funds, rolled over on a daily basis for 3 years, without liability attaching to these directors, under Title 12 U.S.C. Sections 93(a), 93(b), 501a & 503, controlled by the operation thereunder, of Sections of Chapters 2 & 3 of The National Banking Act, the Comptroller of the Currency's regulations, and the federal common law, in favor of Central Bank, a national bank, and Centran, its bank holding company, and its interested shareholders?

2. Whether, it is an abuse of discretion under the federal doctrine of pre-emption, because of the the close connection between the federal and nonfederal claims, for a federal court to dismiss the nonfederal claims without an adjudication thereof, before all questions of federal law are resolved, when the common shareholders are suing their bank holding company directors in a direct and derivative action, both for the role they played in authorizing the excessive buying and financing of government bonds by the national bank they exclusively controlled, that damaged the corporation, and the role the directors played in the 1982 recapitalization with an out of state bank holding company that contravened 12 U.S.C. 1842(d), and the Ohio law, that diluted their stock and breached their pre-emptive rights, the latter being predicated upon a 1971 stock exchange agreement between the shareholders of the national bank and its bank holding company, and probable cause to believe, that Ohio corporation law controls the internal affairs of the Delaware bank holding company?

3. Is the Petitioner, precluded by the Ohio´s 15 year Statute of Limitations, from amending his complaint, to plead an action accruing in 1982, under 15 U.S.C. Sections 77q & 78j(b), for lack of due diligence under federal law, where the existence of preemptive rights in the Centran stock Petitioner purchased in 1978, stem from an unresolved legal issue as to whether Delaware or Ohio law, controls both the 1971 stock exchange agreement between shareholders of Central Bank and Centran, a Delaware corporation, and the internal affairs of Centran, when there is concealment and failure to disclose preemptive rights by the directors of Centran, and diligent inquiry by Petitioner, would lead to the conclusion that they don´t exist?

4. Does Petitioner's Centran stock devolve by operation of law, so as to give him standing to maintain his derivative action through his executor, a proposed substituted party under F.R.A.P. 43(a), when during the pendency of the appeal thereof, Petitioner delivers the stock with a signed stock power, to Respondent bank, trustee of Petitioner's inter vivos insurance trust, where it is wrongfully accepted and acquired by Respondent trustee, based on the terms of the trust, the known intent of Petitioner, by Respondent, that the stock pass by will, and Respondent's failure of legal duty to require Petitioner to obtain independent legal counsel before taking the stock as trustee, when a timely motion is made in the Court of Appeals, to order Respondents' to reissue the stock to Petitioner and deliver it his executor, as a condition precedent, to the substitution of Petitioner's executor as party plaintiff?

5. Does Petitioner have standing, to use the contravention of 12 U.S.C. 1842(d), by Respondents, either as the basis of a private right of action, or for the defensive purpose of excusing demand on the directors or shareholders of Centran, required by F.R.C.P. 23.1, in either of Petitioner's derivative federal count or nonfederal derivative count of his complaint, as a result of 12 U.S.C. 1846, in conjunction with 12 U.S.C 1849(a)?

PARTIES

The Petitioner to this action is:

SYLVESTER MARX, individually, and as a shareholder of Centran Corporation, on behalf of Centran Corporation and all others similarly situated

The Respondents to this action are:

CENTRAN CORPORATION

CENTRAL NATIONAL BANK OF CLEVELAND

JACK C. ROTHWELL, Executive Vice-President Central National Bank of Cleveland and Chairman of the Credit Policy Committee of Centran Corporation

JOHN A. GELBACH, Officer of Central National Bank of Cleveland, Director and Officer of Centran Corporation

WILSON M. BROWN, Jr., President of Central National Bank of Cleveland, Director and President of Centran Corporation

JAMES M. LARGE, Jr., Executive Vice-President Central National Bank and Chairman of Credit Policy Committee of Centran Corporation

GORDON J. SEVOLD, Senior Vice-President Central National Bank and Treasurer of Centran Corporation

OTES BENNET, Jr., Director of
Centran Corporation

GLENN R. BROWN, Director of
Centran Corporation

JOSEPH T. GORMAN, Director of
Centran Corporation

STEPHEN R. HARDIS, Director
of Centran Corporation

WILLIAM F. HAUSERMAN, Director of
Centran Corporation

ALBERT M. HIGLEY, Jr., Director of
Centran Corporation

GEORGE S. LOCKWOOD, Jr., Director of
Centran Corporation

JOHN J. LOFTUS, Director of
Centran Corporation

ROBERT D. McCREERY, Director of
Centran Corporation

JAMES S. REID, Jr., Director of
Centran Corporation

KARL H. RUDOLPH, Director of
Centran Corporation

WARD SMITH, Director of
Centran Corporation

RENOLD D. THOMPSON, Director of
Centran Corporation

ERNEST M. WULIGER, Director of
Centran Corporation

RULE 28.1 STATEMENT

Subsidiaries of Centran Corporation:

Central National Bank, Cleveland, Ohio

Centran Bank of Akron, Akron, Ohio

Richland Trust Corporation, Mansfield, Ohio

Franklin Bank, Columbus, Ohio

Farmers' and Savings Bank, Loudonville, Ohio

Sutton State Bank, Attica, Ohio

Investor's Income Insurance Co., Dallas, Texas

Non Bank Subsidiaries:

Colonial Financial Services, Inc., Birmingham, Alabama

Former Subsidiaries of Centran Corporation:

C.F.S. One, Inc.

People's Investment Corporation

Major Finance Corporation

Protective Loan Corporation

Security Capital Leasing, Inc.

TABLE OF CONTENTS

Questions Presented i

Parties iv

Rule 28.1 Statement vi

Opinions Below 1

Jurisdiction 2

Statutes, Regulations & Rules Involved ..4

Statement of the Case 5

Reasons for Granting the Writ 18

1. This is a case of first impression on an issue of great public importance, as to whether it is ultra vires borrowing, under 12 U.S.C. 24 Seventh., for interlocked directors of a national bank & bank holding company, to bet the bank, when they authorized the purchase of long term U.S. & State bonds for the bank's own account, substantially in excess of the banks capital and surplus, and directed that the purchased bonds be used as collateral, to obtain borrowed monies on short term repurchase agreements and overnights funds, rolled over on a daily basis for three years, as the mode of payment for the purchased bonds 18

2. This is a case of first impression, involving the federal doctrine of preemption, wherein nonfederal claims are so closely connected and interwoven with federal security laws and federal banking policy, as to require an adjudication in Federal Court of the nonfederal claims, for damages sustained from a breach of shareholders' derivative and preemptive rights, stemming from both a 1971 stock exchange agreement between the shareholders of a national bank in Ohio and its Delaware corporation bank holding company, and a speculation in United States and State bonds by the interlocked directors thereof, that resulted in the directors entering into a recapitalization transaction with an out of state, bank holding company, prohibited by 12 U.S.C. 1842(d), and the law of Ohio, where there is probable cause to believe that the corporate law of Ohio will control the internal affairs of the shareholders of the Delaware bank holding company.....32

3. This is a case of first impression, as to whether the Petitioner is precluded by the statute of limitation, for lack of due diligence, from amending his complaint to assert an action accruring in 1982, under title 15 U.S.C. Sections 77q & 78j(b), arising from Centran directors' concealment and failure to make appropiate and seasonable disclosure to its shareholders, as to

their preemptive rights, from 1971 through the 1982 recapitalization transaction by Centran with Midland Marine Bank Inc., executed without Centran´s common shareholder approval, and made in contravention of 12 U.S.C. 1842(d), wherein the Centran directors knew or should have known, but made no disclosure thereof, that Centran´s shareholders have preemptive rights, from the combination of Centran´s 1971 stock exchange agreement with the shareholders of Central National Bank, and Centran´s Delaware corporate charter, when interpreted by the controlling law of Ohio?..... 42

4. This is a case of first impression, involving a probable conflict of law between the U.S. Courts of Appeal for the Sixth and Seventh Circuits, as to whether Petitioner has standing to maintain his derivative action, when the devolution of his stock by operation of law, not involving speculation champerty or collusion to confer jurisdiction, requires the Court of Appeals, during the stay of the mandate, to complete the devolution by operation of law , by granting Petitioner´s motion, and ordering the Respondents to reissue the stock to Petitioner, wrongfully acquired and accepted by them during the pendency of the appeal, before substituting the executor of the Petitioner as a party plaintiff, in accordance with F.R.A.P. 43(a)?.....49

Conclusion.....56

Appendix:

Order of the U.S. District Court (filed July 22, 1983) A1

Memorandum of Opinion of U.S. District Court (Filed July 22, 1983).....A2

Decision and Memorandum of Opinion of U.S. Court of Appeals (Filed November 8, 1984) Reported 747 F.2d 1536.....A62

Order granting extension to file motion for rehearing.....A92

Order denying petition for rehearing Filed January 8, 1985.....A93

Order staying mandate Filed January 23, 1985.....A94

12 U.S.C. § 1.....A45

12 U.S.C. § 24 Seventh.....A45

12 U.S.C. § 82.....A47

12 U.S.C. § 84(8).....A48

12 U.S.C. § 93.....A49

12 U.S.C. § 371(c).....A53

12 U.S.C. § 501a.....A56

12 U.S.C. § 503.....A56

12 U.S.C. § 1842(d).....A52

12 U.S.C. § 1846.....A56

12 U.S.C. § 1849(a).....A57

31 U.S.C. 3102.....A57

Ohio Revised Code 2305.06.....A60

12 C.F.R. § 1.4.....A59

12 C.F.R. § 7.1130.....A59

12 C.F.R. § 7.1131.....A60

12 C.F.R. § 7.7518.....A60

F.R.C.I.V. 23.1.....A61

F.R.A.P. 43(a).....A61

TABLE OF AUTHORITIES

Cases

Armstrong v. Chemical National Bank of City of New York, 83 Federal Reporter 556.....20

Bates v. Treble, 151 U.S. 149.....43

City Federal Savings and Loan Association v. Crowley, 393 F. Supp. 644.....34

Coleman v. Taub, 638 F.2d 628.....46

First National Bank v. National Exchange Bank, 92 U.S. 122.....18

First National Bank of Ottawa v. Converse, 200 U.S. 425.....30

Gries Sport Enterprises, Inc. v. Modell, 15 Ohio St. 3rd 284.....35,46

Hagans v. Lavine, 415 U.S. 528.....41

Hirshfield v. Briskin, 447 F.2d 694.....54

Investment Company Institute v. Camp, 401 U.S. 617.....24

Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n., 405 F. Supp 819.....34

Security Industry Association v. Board of Govenors Federal Reserve System, 568 U.S.---, 82 L.Ed.2d 107.....24

Texas & Pacific Railway Co. v. Pottorff, Receiver, 291 U.S. 242.....20

Statutes

12 C.F.R. § 1.4.....21,23,30,56,57

12 C.F.R. § 7.1130.....21,23,56

12 C.F.R. § 7.1131.....21,23

12 C.F.R. § 7.7518.....56

12 U.S.C. § 1.....30

12 U.S.C. § 24 Seventh.....18,21,23,29,56

12 U.S.C. § 82.....19,20,21,22,23,24,36,56,57

12 U.S.C. § 93(a).....23,35,36,47

12 U.S.C. § 375(b).....23

12 U.S.C. § 503.....23

12 U.S.C. § 1842(d).....34,37,38,39,40

12 U.S.C. § 1846.....37,39,40

12 U.S.C. § 1847.....40

12 U.S.C. § 1848.....40

12 U.S.C. § 1849(a).....37,39,40

31 U.S.C. § 3102.....30

O.R.C. 2305.06.....47

Civil and Appellate Rules of Procedure

F.R.Civ.P. 23.1.....38,56

F.R.A.P. 43(a).....49,51,52,59

Constitution

United States Constitution Amendment V 26

Treatise

51 Am Jur 2d P 695.....47

17 Am Jur 2d P 952.....46

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

SYLVESTER MARX, Individually, and as shareholder of Centran Corporation, on behalf of Centran Corporation and all others similarly situated,
Petitioner,

vs.

CENTRAN CORPORATION, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the U.S. Court of Appeals
For the Sixth Circuit

OPINIONS BELOW

The opinions of the District Court for the Northern District of Ohio, Eastern Division, and the U.S. Court of Appeals for the Sixth Circuit, appear in the appendix hereto.

JURISDICTION

The final judgment of the District Court for the Northern District of Ohio, Eastern Division, was entered on July 22,1983. A Notice of Appeal to the U.S. Court of Appeals for the Sixth Circuit was filed by Petitioner on August 18, 1983. The final judgment of U.S. Court of Appeals for the Sixth Circuit was entered on November 8, 1984. On November 21, 1984, upon motion duly filed, the Court of Appeals granted an extension to December 7, 1984, to file Petitioner's motion for rehearing with suggestion for rehearing en banc. On December 6, 1984,,Petitioner filed his motion for rehearing which was denied on January 8, 1985, by the Court of Appeals.

The Petitioner, requests the review of the opinion of the Court of Appeals for the Sixth Circuit, rendered on November 8, 1984, and its denial of the petition for rehearing on January 8, 1985. This petition for writ of certiorari is filed within ninety days of

the date of the denial of the petition for rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

Petitioner, Sylvester Marx, died on November 20, 1984. On February 11, 1985, all Respondents joined in a motion to substitute Donald Marx, executor of the estate of Petitioner, as a substituted party plaintiff -appellant, pursuant to F.R.A.P. 43(a), and moved to abate and/or dismiss the derivative action.

A suggestion of death, with a motion to substitute Donald Marx, executor of the estate of Sylvester Marx in accordance with F.R.A.P 43(a), was filed on behalf of the Petitioner with the Court of Appeals on February 20, 1985. Also filed at the same time, as a condition precedent to the substitution, was a motion to order Central Bank and Centran's transfer agent, to reissue 200 shares of Centran corporation stock certificate No. N 00831, dated February 16,

1978, in the name of Sylvester Marx and deliver it forthwith, to Donald Marx, executor of the estate of Sylvester Marx. These motions are currently pending in the Court of Appeals.

The basis for jurisdiction in the Federal District Court of first instance, arises under Title 28 United States Code Sections 1331 & 1337; Title 12 United States Code, Chapters 2 & 3, including but not limited to Sections 93(a), 93(b), 501a, and 503; 12 United States Code, Chapter 17 including but not limited to Sections 1842(d), 1846, 1847, 1848 and 1849(a); federal common law jurisdiction, and pendent jurisdiction over the nonfederal actions.

STATUTES & REGULATIONS INVOLVED

Chapters 2 & 3 of the National Banking Act, The Comptroller of the Currency's Regulations thereunder, and The Bank Holding Company Act. Only Title 12 U.S.C. Sections

11, 24 Seventh., 82, 84(8) since amended, 93(a), 93(b), 371(c), 501a, 503, 1842(d), 1846, 1849(a); 31 U.S.C. 3102; Ohio Revised Code 2305.06, 12 C.F.R. Sections 7.1130, 71131, and 7.7518; F.R.Civ.P. 23.1; F.R.A.P. 43(a); appear in the appendix.

STATEMENT OF THE CASE

Central Bank, a national bank is and was situated in the City of Cleveland, County of Cuyahoga, State of Ohio. In 1971 their shareholders entered into a stock exchange agreement with Centran, a bank holding company, incorporated in Delaware, formed by the directors of the bank. The agreement contained no provision as to preemptive rights. The corporate charter of Centran, contained no reference to preemptive rights. However, the charter of the national bank specifically excluded preemptive rights, so that prior to the stock exchange agreement the shareholders of the national bank had no preemptive rights.

Centran stipulated that it did no business whatsoever in the State of Delaware. Its principal place of business is in Cleveland, Ohio, and at all times it conducted itself as a Delaware Corporation. All the directors of Centran were directors of the Central Bank.

Late in 1979, these directors embarked in an investment program and procedure, whereby the bank would purchase long term U.S. & State bonds for its own account, place them in the Federal Reserve Bank, and use the bonds as collateral to borrow through the use of short term repurchase agreements and overnight funds, as the method of covering the payment of these bonds so purchased. This program continued from its inception through the years of 1980, 1981, and part of 1982, as a deliberate policy of the bank and its holding company, duly adopted by the directors.

It is standard operation for a bank to buy U.S. & State bonds for its own account and

pay for the bonds with depositors money. Often a bank will keep its capital and surplus not needed for daily operations in U.S. & State bonds. Indeed 12 U.S.C. 82, provided during the directors´ program, that the bank was authorized to borrow, to buy U.S. & State bonds in an amount equal to its capital plus 50 percent of surplus.

However, in 1980 with a borrowing authority of 71 million under 12 U.S.C. 82, Central Bank purchased 307 million in long term U.S. & State bonds for its own account, paying for them with monies borrowed on them in the form of short term repurchase agreement and overnight funds, rolled over on a daily basis for three years.

Petitioner claimed, that this act was beyond the directors authority as proscribed by the National Banking Act, Chapters 2 & 3 and the Comptroller of the Currency´s regulations. It was contended that these acts contravened Title 12 U.S.C. 24 Seventh.,

82, 84(8) and 375(b) and 12 C.F.R. 1.4 called the Rule of Prudence, by which the interlocked directors were liable under Title 12 U.S.C. Sections 93(a)&(b), 501a and 503.

The bank,either excessively bought and excessively borrowed U.S., & State bonds or it did so on behalf of Centran, its bank holding company. The Courts below, found these acts to be authorized by the National Banking Act or under the control of the Comptroller of the Currency, precluding any federal private action by Petitioner. They found that the Comptroller of the Currency was well within his authority to enact regulations deeming Respondents' conduct, in regard to the borrowing, a purchase and a sale, and that the Respondent directors had a right to rely on such regulations even if they were ultra vires.

They found, that the absence of any loan agreement between the bank and its holding

company, precluded any wrongful extension of credit to the holding company by the bank under 12 U.S.C. 375(b), constructively or otherwise. The nonfederal claims for imprudent banking judgment and breach of state fiduciary duty to follow federal law were dismissed without prejudice.

As a consequence of the directors' program, the bank lost in excess of 50 million dollars. Its reserve was impaired and it became necessary to recapitalize in order to continue in the banking business. Central Bank represents a substantial asset to Centran's, it being approximately 75 percent thereof.

Centran directors consequently, in 1982, entered into a stock exchange agreement with Midland Marine Bank Inc., a bank holding company incorporated in Delaware, with all its banking subsidiaries in the State of New York, whereby in exchange for 70 million dollars, Centran directors gave Midland

Marine Bank preferred stock in Centran, plus warrants for 37 percent of the common stock at 30 dollars a share, exercisable in January 1985.

There was no formal approval of this recapitalization transaction by either the shareholders or the Federal Reserve Board of Governors. It was contended that this transaction contravened 12 U.S.C. 1842(d), in that Marine Midland Bank Inc. indirectly gained control of Central Bank through this transaction, when the State of Ohio has not authorized out of state bank holding companies do so. There was no appropriate notice to the shareholders prior to this transaction in regard to their preemptive rights and none were tendered to them, before giving Midland Marine Bank its position to 37 percent of the common through warrants.

The Court of Appeals did not reach the issue as to whether 12 U.S.C. 1842(d) was contravened. Nor did the Court of Appeals

interpret whether Title 12 U.S.C. 1846 or 1849(a) was available to Petitioner in state court, if in fact it was contravened. It did conclude that there was no federal private right of action, interpreting Title 12 U.S.C. Sections 1847 & 1848.

Petitioner´s amended complaint, Count II, a derivative action, alleges that no demand was made on the directors prior to suit, their interest being antagonistic to the interests of the bank and bank holding company. No demand was made on the shareholders, since they could not ratify acts which contravened federal statutory law. There were approximately 10,000 shareholders of Centran at the inception of this suit.

Count II of the amended complaint, incorporated allegations of Count I, the direct class action against the directors, based on alleged violations of the National Banking Act, The Comptroller of the Currency

Regulations, the Bank Holding Company Act and breach of state fiduciary duty to follow federal law. Count III incorporated by reference the allegations of Counts I & II and alleged class and derivative actions based on state law.

After stipulations were entered into and production of documents were made, the Respondents moved for summary judgment on Count I. Though it was stipulated that other stipulations were contemplated by the parties as to Count II, the District Court granted Respondents' motion on Count I, finding no breach of any federal law. It then dismissed Count II on the basis of the futility of amendment principle, ruling, that the statute of limitations barred any action under federal security laws, though the issue had not been pled or briefed. The District Court then dismissed Count III without prejudice.

In the Court of Appeals, Petitioner

contended, that the statute of limitations did not bar his federal security actions. The contention was premised on the 1971 stock exchange agreement, made and executed in Cleveland, Ohio, between the shareholders of the national bank and Centran, that contained no provison in regard preemptive rights and upon the articles of incorporation or corporate charter of Centran, that also lacked any provisions in regard to preemptive rights. It was further contended, that the right of action based on a 1971 stock exchange agreement did not accrue under the contract until 1982 when the damage occurred. Contract actions in Ohio are barred by a 15 year statute of limitations.

It was contended that Ohio corporation law controls the internal affairs of Centran, the bank holding company incorporated in Delaware, since it did had no business whatsoever, in Delaware. (The Ohio Supreme Court has recently sustained this position as

to another Delaware corporation). Ohio corporation law provides for preemptive rights, when no mention is made to them in the articles of incorporation or charter, whereas, Delaware law is just the opposite.

The Court of Appeals held, that there was a lack of due diligence on the part of Petitioner at the time he bought the stock in 1978 and that he is barred by the statute of limitations. The Court denied Petitioner's timely motion for rehearing as to Petitioner's contention, that the borrowing by the bank was not prudent, safe or temporary and was ultra vires in regard to 12 U.S.C. 24 Seventh.; that the incidental powers therein, were not covenient for the express use authorizing the unlimited purchasing of government bonds, and that their decision in this case, departed from the law of the Sixth Circuit and the United States Supreme Court.

On October 29, 1984 Petitioner, advanced in age, suffering from leukemia and

no longer able to handle his own affairs, accompanied by his adult son Donald Marx, presented himself to a trust officer of Central Bank, to fund his insurance trust of November 14, 1980 with Central Bank as trustee, with a substantial amount of diverse stock. The trust officer accepted the stocks along with signed stock powers which included the 200 shares of Centran stock, that is the basis of Petitioner´s standing to bring the derivative action herein. At the same time, the trust officer was handed a copy of Petitioner´s will executed December 2, 1982, (now duly probated) which contained a provision bequesting the 200 shares of Centran stock to Petitioner´s children with the proviso that they hold the stock until this case at bar is concluded.

Petitioner died on November 20, 1984, 12 days after the decision of the Court of Appeals. An informal suggestion of death was made in the request to stay the mandate.

Thereafter, Central Bank joined with all Respondents in a motion filed in the Court of Appeals to substitute as party plaintiff, Donald Marx, executor of the estate of Petitioner and to abate or partially dismiss all the derivative actions.

In response, the attorneys for Petitioner filed a formal suggestion of death of Petitioner and moved the Court of Appeals for and order requiring Central Bank and Centran, to reissue the wrongfully taken Centran stock in the name of Petitioner and deliver it, forthwith, to Donald Marx, executor, prior to substituting Donald Marx, executor, as a party.

Respondents contend, that Petitioner´s Centran stock has not passed by operation of law. Petitioner contends, that the terms of the trust prohibit the acceptance of the Centran stock by Central Bank, trustee, and that before acceptance of the Centran stock by the trustee, it was the trustee´s duty in

these circumstances, under the law, to require Petitioner to obtain independent legal counsel, before trustee could lawfully accept the stock as part of the trust.

These motions are currently pending in the U.S. Court of Appeals for the Sixth Circuit. For the purpose of this writ of certiorari it has been assumed that the Court of Appeals has denied the Petitioner´s motions.

REASONS FOR GRANTING OF THE WRIT

1. **THIS IS A CASE OF FIRST IMPRESSION ON AN ISSUE OF GREAT PUBLIC IMPORTANCE, AS TO WHETHER IT IS ULTRA VIRES BORROWING, UNDER 12 U.S.C 24 SEVENTH., FOR INTERLOCKED DIRECTORS OF A NATIONAL BANK & BANK HOLDING COMPANY, TO BET THE BANK, WHEN THEY AUTHORIZED THE PURCHASE OF LONG TERM U.S. & STATE BONDS FOR THE BANK´S OWN ACCOUNT, SUBSTANTIALLY IN EXCESS OF THE BANK´S CAPITAL AND SURPLUS, AND DIRECTED THAT THE PURCHASED BONDS BE USED AS COLLATERAL, TO OBTAIN BORROWED FUNDS ON SHORT TERM REPURCHASE AGREEMENTS AND OVERNIGHT FUNDS, ROLLED OVER ON A DAILY BASIS FOR THREE YEARS, AS THE MODE OF PAYMENT FOR THE PURCHASED BONDS.**

It has been a long standing rule, that national banks may borrow, only if such borrowing can be done safely, prudently and temporarily. See First National Bank v National Exchange Bank, 92 U.S. 122 at 127.

This interpretation of, "..subject to law, all such incidental powers as shall be necessary for carrying on the business of banking", contained in 12 U.S.C. 24 Seventh., has never been considered by this Court, in the context as to whether it is convenient for the use of the express power following

therein, "..The limitations and restrictions herein contained as to dealing in, underwriting and purchasing for its own account, investment securities shall not apply to obligations of the United States, or general obligations of any State or of any political subdivision thereof." The facts of this case present such a question.

The Respondents in this case, purchased 307 million dollars of long term government bonds and used them as collateral to borrow short term monies on a long term basis as the mode of payment for the bonds purchased. Petitioner has contended the borrowing was ultra vires because it was not temporary; and it was not prudent or safe because the purchase of the bonds not only exceeded the capital and surplus of the national bank but also the limitations of 12 U.S.C 82, that was in effect at the time of the transaction.

Petitioner contends this is a case where the incidental power is not convenient for

the use of the express power. As this Court has stated, "A practice is not within the incidental powers of a corporation merely because it is convenient for the express power." See Texas & Pacific Railway Co. v. Pottorff, Receiver, 291 U.S. 242 at 255, note 7. The U.S Court of Appeals for the Sixth Circuit in Armstrong v. Chemical National Bank of City of New York, 83 Federal Reporter 556 at 566, stated the long standing rule made by this Court, that "..The power to borrow money or give notes is not expressly given by National Banking Act; that the business of the bank is to lend, not to borrow money."

12 U.S.C. 82, prior to its repeal in October of 1982, performed the function of limiting the authority of a national bank to borrow monies,to its capital plus 50 percent of it surplus. It made no exception for borrowing on United States & State bonds. It contained no grant of authority to enact any regulations of any kind whatsoever, to the

Comptroller of the Currency. It was in full force and effect in regard to Respondents conduct. This statute together with 12 U.S.C.24 Seventh., and 12 C.F.R 1.4 acted as a safety measure, preventing banks from purchasing long term United States & State bonds, and then using the bonds as collateral to obtain borrowed monies on short term repurchase agreements and overnight funds in the Federal Reserve Bank as a mode payment for the bonds, unless the monies borrowed were within the capital and surplus limitation of Section 82.

In the Respondents´ case, the bank borrowed 307 million dollars on short term repurchase agreements and overnight funds, rolled over on a daily basis for 3 years, to pay for a like purchase of government bonds, when the bank´s authority to borrow was limited under 12 U.S.C. 82, to 77 million dollars based on its capital and surplus. Thus, the director Respondents, in authorizing the

purchase of government bonds, funded by borrowing thereon, exceeded not only the capital and surplus limitations of Section 82, but borrowed substantially beyond the bank´s capital and surplus.

The Federal Courts below, ruled that 12 U.S.C. 82, was inapplicable to Respondents´ case, since it had been repealed retroactively and no injustice accrued by not applying it, inasmuch as there was no violation of chapter 2 of the National Banking Act. The injustice Petitioner had asserted, to wit: that the bank lost 50 million dollars and was recapitalized without shareholder approval, wherein the common stock was diluted by 37 percent through the issuance warrants, and the shareholders were denied their preemptive rights, was not enough to invoke the application of 12 U.S.C. 82 to Petitioner´s case.

The Courts below opined, that even if as

contended, that the Comptroller of Currency's regulations were gratuitously enacted in the 1970's without authorization from 12 U.S.C. 82, Respondents were entitled to rely on 12 C.F.R. 7.1130 & 7.1131 which provides that the Federal Funds Purchased and Repos, were not to be regarded as debts or as a borrowing under Section 82, but is to be regarded as a purchase and sale of such funds.

The Courts below also ruled that 12 C.F.R 1.4, enacted pursuant to 12 U.S.C 24 Seventh., limiting the purchase of U.S. & State bonds to the exercise of prudent banking judgment, could not be construed as part of 12 U.S.C. 93(a), giving the Petitioner a direct right of action. Further, without evidence of a loan between the bank and its holding company, a constructive loan could not be inferred for which liability could attach under 12 U.S.C. 375(b), enforced through 12 U.S.C. 503.

The legislative history of the National

Banking Act, shows that Congress focused on the more subtle hazards that arise when a commercial bank enters the investment banking business and that Congress intended to forbid Respondents' conduct herein. See this Court's comments, in this regard, in Investment Company Institute v. Camp, 401 U.S. 617, and Security Industry Association v. Board of Governors Federal Reserve System, 468 U.S.--, 82 L Ed2d 107 at page 114.

The Courts below have reinterpreted Congressional intent, altered as they say, by the enactment of the Garn-St. Germain Depository Institutions Act of 1982, wherein the legislative history as to the repeal of 12 U.S.C. 82, states: "..The rigid limitations of Section 82 adversely restrain bank flexibility and competitively disadvantage national banks.", "Most significantly,..the bill would substantially amend the arbitrary and inflexible laws affecting national bank lending and borrowing practices", "..that

are obsolete and unjustifiably.", re-strictive. This language caused the Courts below to conclude, that either Respondents conduct, is now authorized by the National Banking Act or it is under the exclusive control of the Comptroller of the Currency.

Thus, between the construction of the statutes of the National Banking Act and the Comptroller of the Currency's regulations, the Courts below, have foreclosed and precluded any federal right of action by shareholders of bank and bank holding companies for acts by interlocked directors thereof, in regard to the excessive purchases of government bonds and the excessive borrowing accompanying and supporting the purchase.

The control of the directors for speculating in government bonds is completely in the hands of the Comptroller of the Currency, who at the appropiate time can

appoint a receiver, or by way of penalty, forfeit the bank's charter or levy a fine up to a 1000 dollars a day for as long as the violation has continued. Presumably, the Comptroller could take action if he found a violation occurred, whether the speculation succeeded or failed; so that conceivably, had there been windfall profits from the speculation, the bank's charter could have been revoked.

If Congress has succeeded by its recent legislation in 1982, in allowing speculation in government bonds by national banks without permitting any direct action against the directors for losses sustained by the shareholders, Congress has effectively taken shareholders private property for public use, without just compensation, and without due process of law, prohibited by Amendment 5 of the United States Constitution.

The private property taken, is the contractual right the shareholders have to

control their corporation. With the Comptroller having pre-empted shareholder control in the area of investment banking in government bonds, the shareholders' right of control has been converted to public use in the national banking system without compensation therefor.

Shareholders' contractual rights with its corporation and its directors, includes the implied agreement that the directors will be prudent in the conduct of the affairs of both the national bank and the bank holding company. In this case the shareholders with no federal rights have only illusory state rights, in regard to the nonfederal actions for waste and imprudent banking judgment that survives.

Respondents, as they have here, by asserting the business judgment defense for their conduct in state court, would seemingly require a state judge to direct a verdict in their favor on the basis of federal

pre-emption, if federal policy authorizes national banks to buy long term U.S. & State bonds for their own account in excess of their capital, surplus and deposits, and use those government bonds as collateral, to fund that purchase by the use of short term repurchase agreements and overnight funds, rolled over on a long term basis.

Buying long term United States & State bonds on margin for the bank´s own account becomes speculative, when the amount borrowed on the purchased government bonds, exceed the bank´s capital plus 50 percent of its surplus. If it is not speculative at that point, perhaps it becomes speculative when it goes beyond the bank´s capital and surplus. However, under the Comptroller´s regulations it is never speculative because his regulations have deemed the borrowing, such as the Respondents have engaged in, a purchase and sale.

The "..subject to law, all incidental

powers necessary as shall be necessary to carry on the business of banking" of 12 U.S.C. 24 Seventh., must necessarily include the Comptroller´s regulations by virtue of the "subject to law" provision contained therein. It has long been the rule that duly authorized and enacted regulations are part of the law.

Consequently, the posture of the National Banking Act, at least in the Sixth Circuit, authorizes the unlimited purchases of long term United States & State bonds by national banks without regard to their capital, surplus or deposits, and is only curtailed by the amount of bank credit obtainable by it,on short term repurchase agreements and overnight funds in the Federal Reserve Bank secured by the United States & State bonds.

It is manifest, that on day one of the bank´s excessive purchase of government bonds, regardless of the amount of the

excess, with the bonds standing as collateral, the entire purchase can be paid for by borrowed funds in the same manner as the Respondents achieved it. 12 C.F.R. 1.4 does not curtail the buying of government bonds by banks, because under 12 U.S.C. 1, the Comptroller is placed under the general directions of the Secretary of the Treasury, whose duty it is, under 31 U.S.C. 3102, to sell United States bonds, creating a conflict of interest in the Comptroller whose duty is to enforce this "rule of prudence" in banks buying of United States bonds.

It has been a long time since this Court declared in First National Bank of Ottawa v Converse, 200 U.S. 425 at page 439, "...no authority, express or implied, has ever been conferred by statutes of the United States upon a national bank to engage or promote a purely speculative business or adventure..".

Apparently, this is no longer true, in

view of the holdings in this case in the Courts below, and in view of the change in the statutes of the National Banking Act and the Comptroller of the Currency's regulations. In either case,the issue should be settled by the United States Supreme Court, since the federal questions relevant thereto, conflict with earlier decisions of this Court, and present federal questions and constitutional questions of first impression.

2. **THIS IS A CASE OF FIRST IMPRESSION, INVOLVING THE FEDERAL DOCTRINE OF PREEMPTION, WHEREIN NONFEDERAL CLAIMS ARE SO CLOSELY CONNECTED AND INTERWOVEN WITH FEDERAL SECURITY LAWS & FEDERAL BANKING POLICY, AS TO REQUIRE AN ADJUDICATION IN FEDERAL COURT OF THE NONFEDERAL CLAIMS, FOR DAMAGES SUSTAINED FROM A BREACH OF SHAREHOLDERS' DERIVATIVE & PREEMPTIVE RIGHTS, STEMMING FROM BOTH A 1971 STOCK EXCHANGE AGREEMENT BETWEEN THE SHAREHOLDERS OF A NATIONAL BANK IN OHIO AND ITS DELAWARE CORPORATION BANK HOLDING COMPANY, AND A SPECULATION IN UNITED STATES & STATE BONDS BY THE INTERLOCKED DIRECTORS THEREOF, THAT RESULTED IN THE DIRECTORS ENTERING INTO A RECAPITALIZING TRANSACTION, WITH AN OUT OF STATE BANK HOLDING COMPANY, PROHIBITED BY 12 U.S.C. 1842(d), AND THE LAW OF OHIO, WHERE THERE IS PROBABLE CAUSE TO BELIEVE, THAT CORPORATE LAW OF OHIO WILL CONTROL THE INTERNAL AFFAIRS OF THE SHAREHOLDERS' DELAWARE BANK HOLDING COMPANY.**

The statement above clearly shows a factual pattern that requires a complete adjudication in Federal Court. Segregation of the body of this case into a federal appendage and state appendage is an abuse of discretion, because of the single set of operative facts from which Petitioner's rights emerge. There are numerous

substantial federal questions to be resolved, notwithstanding the findings by the Courts below that there were no federal violations under the National Banking Act or Bank Holding Company Act.

In this case, the internal affairs of the national bank and bank holding company are comingled in that one board of directors, operates both. In the scheme of things, when there is interference with the internal affairs of a national bank, that interference is usually preempted by federal law, whereas actions against bank holding companies are generally state actions.

The rights of shareholders of the national bank, in the stock exchange agreement with its Delaware bank holding company, at the time of the stock exchange agreement in 1971, is a federal question requiring the application of federal common law. This is true because of the Petitioner's claim, that the cause of action in regard to loss of

preemptive rights and dilution under that contract arose in 1982, as a result of speculation of the interlocked directors and their contravention of 12 U.S.C 1842(d). See the analysis in City Federal Savings and Loan Association v. Crowley, 393 F. Supp. 644 at pages 654 thru 657, and Rettig v. Arlington Hghts. Fed. Sav. & Loan Ass'n, 405 F Supp. 819 at page 823.

This agreement made no reference to preemptive rights, though there were no preemptive rights in the stock held by the shareholders in the national bank. The 1971 stock exchange agreement was made and executed in Cleveland, Ohio. It was stipulated that Centran, did no business in Delaware. The respondents stipulated that preemptive rights were not mentioned in the 1971 merger agreement nor have they made any disclosure in regard to preemptive rights since the 1971 agreement. However, there was a limited filing with the Securities Exchange

Commission, which shows that a special block of Centran shareholders were advised that no preemptive rights exist.

If Respondents maintain that there were no preemptive rights, such a statement is seemingly a false report actionable under 12 U.S.C. 93(a). If there were preemptive rights the shareholders should have been given them.

The articles of incorporation of Centran made no mention of preemptive rights. Under Ohio law, the failure to mention preemptive rights in the articles of incorporation create them, whereas under Delaware law the result is the opposite. Under these circumstances under the authority of Gries Sports Enterprises, Inc. v. Modell, 15 Ohio St. 3rd 284, it is likely that Ohio law will control the internal affairs of Centran, a Delaware corporation which are intertwined with the shareholders of a national bank.

Whether there be a breach of contract

action or not, the question of whether there was a continuing fiduciary duty on the part of the Respondent directors to disclose and notice the shareholders of Centran, one way or another, in regard to their preemptive rights prior to recapitalization, is a federal question requiring the application of federal common law, since it was they or their predecessors, who formed the bank holding company and drew the stock exchange agreement.

In this case, the stipulated facts make readily apparent that 12 U.S.C. 82, was violated. 12 U.S.C. 93(a), precludes a common law action for waste against the directors of a national bank while state common law authorizes such an action against directors of a bank holding company. While it cannot be disputed that national banks and bank holding companies are amenable to suit in state courts, nonetheless, where there are strong federal policy considerations, the case,

though it involves nonfederal claims, should be adjudicated in Federal Court, when there is federal jurisdiction.

It has always been a strong federal policy consideration to have the law of the state of incorporation control. However, this is a case where there is strong precedent that Ohio law will control the Delaware bank holding company. There is a strong federal policy consideration in the noncontravention of 12 U.S.C. 1842(d), and it is a federal question as to whether state common law rights affords relief to the shareholders of the bank holding company under an interpretation of 12 U.S.C. 1846 and 1849..

The Court of Appeals for the Sixth Circuit declined to decide whether 12 U.S.C. 1842(d), was contravened by Respondents in the 1982 recapitalization transaction with the New York bank holding company, leaving that issue for the state court to decide. This is a pivotal issue, involving not only the

interpretation of the statute in a case of first impression, but also involves the legal consequences, if any, of Respondents failure to obtain formal Federal Reserve Board of Governors' approval of the transaction as required by law. It seems clear that if 12 U.S.C.1842(d), was contravened, demand on the shareholders required by F.R.C.P. 23.1 would be abated in the state claims.

Petitioner's claims stem from one operative set of facts, set forth above, in the reason to grant the writ. They were plead both as a federal statutory claim and state claim for breach of fiduciary duty to follow federal law and is not in the category of artful pleading, though thoughtfully prepared by the facts and the law, as it appeared at the time of filing. The federal statutory claims were ruled upon and the complaint dismissed without prejudice as to the nonfederal claims. However, the Court of Appeals did not rule on certain federal statutes as to

whether the federal law preempts, or whether a state action exists for Petitioner for Respondents contravention of 12 U.S.C. 1842(d).

Petitioner, quite properly, first raised the issue on appeal as to whether 12 U.S.C. 1846 and 1849, permitted a cause of action under federal common law or state law for breach of state fiduciary duty to follow federal law in regard to 12 U.S.C. 1842(d). The District Court finding no federal claim, dismissed Count I of Petitioner's class action and then dismissed Count II, the federal derivative count, sua sponte, on the futility of amendment principle, permitting the issue to be raised for the first time on appeal. Count III, nonfederal class and derivative claims were dismissed without prejudice. The Court of Appeals did not reach these questions of first impression, though it affirmed the lower Court that no federal cause of action existed, pursuant to 12

U.S.C. 1847 and 1848.

12 U.S.C. 1846, is a reservation of power to the states in regard to bank holding companies and 12 U.S.C. 1849(a) states that the Bank Holding Act shall not be "construed as approving any act, action or conduct which is, has been or may be, in violation of existing law, nor shall anything herein contained, constitute a defense to any action, suit or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action or conduct, except as as specifically provided in this section." This may be very well be interpreted to mean in the face an action for breach of state fiduciary duty to follow the federal law 12 U.S.C.1842(d), shareholders have a right action.

Both the District Court and the Court of Appeals abused it discretion in not adjudicating completely the federal questions raised by Petitioner and by

refusing to adjudicate, the nonfederal claims, thereby splitting the context when it had it. The operative facts involve complex questions of federal and state law that are intertwined dealing with federal banking policy and national bank stock. Applying the federal statute of limitations to the right of action under federal security laws does not resolve the problem.

This Court has noted, in the case of Hagans v. Lavine, 415 U.S. 528 at page 545, "First, it is evident from Gibbs, (383 U.S. 715) that pendent state law claims are not always, or even almost always, to be dismissed and not adjudicated. On the contrary, given advantages of economy and convenience and no unfairness to litigants, Gibbs, contemplates adjudication of these claims."

3. **THIS IS A CASE OF FIRST IMPRESSION, AS TO WHETHER THE PETITIONER IS PRECLUDED BY THE STATUTE OF LIMITATIONS, FOR LACK OF DUE DILIGENCE, FROM AMENDING HIS COMPLAINT TO ASSERT AN ACTION ACCRUING IN I982, UNDER TITLE 15 U.S.C. SECTIONS 77q & 78j(b), ARISING FROM CENTRAN DIRECTORS´ CONCEALMENT AND FAILURE TO MAKE APPROPIATE & SEASONABLE DISCLOSURE TO ITS SHAREHOLDERS, AS TO THEIR PREEMPTIVE RIGHTS, FROM 1971, THROUGH THE 1982 RECAPITALIZATION TRANSACTION BY CENTRAN WITH MIDLAND MARINE BANK INC., EXECUTED WITHOUT CENTRAN´S COMMON SHAREHOLDER APPROVAL, AND MADE IN CONTRAVENTION OF 12 U.S.C. 1842(d), WHEREIN THE CENTRAN DIRECTORS, KNEW OR SHOULD HAVE KNOWN, BUT MADE NO DISCLOSURE THEREOF, THAT CENTRAN´S SHAREHOLDERS HAVE PREEMPTIVE RIGHTS, FROM THE COMBINATION OF, CENTRAN´S 1971 STOCK EXCHANGE AGREEMENT WITH THE SHAREHOLDERS OF CENTRAL NATIONAL BANK, AND CENTRAN´S DELAWARE CORPORATE CHARTER, WHEN INTERPRETED BY THE CONTROLLING LAW OF OHIO.**

Petitioner´s three count complaint, was dismissed by the District Court upon the granting of Respondents´ motion for summary judgment on Count I, with the Court finding, that amendment would be futile. The Court opined, that the federal statute of limitations precluded amendment of the complaint to allege a federal securities

action, based on the partial stipulation of facts before the Court, even though the action had not been pled or briefed. The Court of Appeals affirmed, holding that Petitioner was barred by the federal statute of limitations, on the date Petitioner purchased the stock, in 1978.

The directors of the bank holding company occupy a fiduciary duty to their shareholders. When they recapitalized Centran and Central Bank, the directors had a duty to seasonably disclose to their shareholders, that they had no preemptive rights, before they entered into the 1982, recapitalization transaction where warrants were issued for 37 percent of the common stock. In the case of Bates v Treble, 151 U.S. 149, this Court held in sylabus 4, that if there be fiduciary relations between the parties, there need be no evidence of fraudulent concealment other than that implied from the transaction.

The transaction in this case relates back to a 1971, stock exchange agreement between shareholders of Central National bank and its holding company Centran. The stock exchange agreement was sub silentio in regard to preemptive rights, though the shareholders of the national bank had no preemptive rights, before entering the transaction. The parties stipulated, that there was no notice to Centran shareholders in regard to preemptive rights since 1971. However, a small, limited block of Centran shareholders were put on notice, that there were no preemptive rights, in a prospectus filed by Centran with the Securities Exchange Commission in 1972.

Centran has at all times, conducted itself as a Delaware corporation. Its corporate charter is also sub silentio in regard to preemptive rights. Under Delaware law, in these circumstance, there are no preemptive rights. This was not disclosed in

the 1971 stock exchange transaction. When Centran recapitalized in 1982, there was no preemptive rights tendered to its shareholders, nor was any disclosure made in regard to them, prior to the transaction.

Any diligent shareholder, not privy to the stock exchange agreement, could have only discovered that there were no preemptive rights by virtue of the Centran charter, the prospectus filed with the Securities Exchange Commission, Centran´s conduct as a Delaware corporation and the silence of Centran when they had a duty to disclose.

Centran directors, prior to their recapitalization, had a fiduciary duty to obtain shareholder approval, when the terms of the recapitalization involved a dilution of the common stock by the issuance of warrrants for 37 percent of the common stock. Such approval, would have eliminated any claim of preemptive rights.

The Petitioner contends, that the

preemptive rights exist contractually, pursuant to the 1971 stock exchange agreement between shareholders of the national bank and Centran, and by virtue of Ohio law, which controls the interpretation of the agreement and the corporate charter of Centran. See Gries Sports Enterprises, Inc. v. Modell, 15 Ohio St.3d 284. The contract was drawn by Centran and executed in Ohio. The Respondents stipulated they do no business whatsoever in Delaware.

The rights of stockholder are contractual and may be altered by binding agreements between stockholders and the corporation. See Coleman v. Taub, 638 F2d. 628. Though the shareholders of the national bank had no preemptive rights prior to the stock exchange agreement, under the doctrine of merger, all understandings are merged into the written contract. See 17 Am. Jur. 2d p. 952 section 483. As a general rule the Statute of Limitations begins to run in a civil action

on contracts from the time the right of action accrues which is usually the breach of agreement. See 51 Am. Jur. 2d p. 695 section 126.

The breach of the 1971 agreement occurred in 1982. Ohio Revised Code 2305.06, statute of limitations on written contract is 15 years. The concealment and breach of fiduciary duty in remaining silent, as to the preemptive rights by the Centran directors, permit an action under the federal security laws at the time of the breach, and should toll any statute of limitations determined to be applicable earlier since a shareholder could not with diligence determine the status of his preemptive rights.

Alternatively, should it be determined, that through due diligence the Petitioner could have ascertained, that there no preemptive rights, he certainly would have a right of action under 12 U.S.C. 93(a) for the filing of a false report by the directors, if

as contended, there are preemptive rights.

4. **THIS IS A CASE OF FIRST IMPRESSION, INVOLVING A PROBABLE CONFLICT OF LAW BETWEEN THE U.S. COURTS OF APPEAL FOR THE SIXTH AND SEVENTH CIRCUITS, AS TO WHETHER A PETITIONER HAS STANDING TO MAINTAIN HIS DERIVATIVE ACTION, WHEN THE DEVOLUTION OF HIS STOCK BY OPERATION OF LAW, NOT INVOLVING SPECULATION, CHAMPERTY OR COLLUSION TO CONFER JURISDICTION, REQUIRES THE COURT OF APPEALS, DURING THE STAY OF THE MANDATE, TO COMPLETE THE DEVOLUTION BY OPERATION OF LAW, BY GRANTING PETITIONER'S MOTION, AND ORDERING THE RESPONDENTS TO REISSUE THE STOCK TO PETITIONER, WRONGFULLY ACQUIRED AND ACCEPTED BY THEM DURING THE PENDENCY OF APPEAL, BEFORE SUBSTITUTING THE EXECUTOR OF THE PETITIONER AS A PARTY PLAINTIFF, IN ACCORDANCE WITH F.R.A.P 43(a)?**

Federal Rule of Appellate Procedure 43(a), delineates the procedure for substitution of parties, when the death occurs after the notice of appeal has been filed. The rule provides authority to the Court of Appeals, to direct the proceedings in the event that there is no personal representative, but does not directly authorize the Court of Appeals to direct the proceedings in regard to the substitution of parties when there is a personal

representative, as in the case sub judice.

F.R.A.P. 43(a), is a procedural rule. It is a question of first impression, as to whether it is a grant of equity jurisdiction to the Court of Appeals, to direct proceedings and conduct hearings, during the stay of the mandate, in order to determine substantive issues of fact, prior to the granting or denying of a motion for substitution in a derivative action, where the death of the party occurred after its decision in the case, but prior to its denial of the petition for rehearing?

On October 29, 1984, 10 days before the Court of Appeals entered its decision in Petitioner´s class and derivative case, Petitioner delivered among other stock, his Centran stock with a signed stock power to Respondent, Central Bank, where it was accepted by Respondent, as trustee, as part of Petitioner´s insurance inter vivos revocable trust. The Respondent, forthwith,

caused the Centran stock to be transferred into "Street Name", a customary procedure of the bank, unless other arrangements are made, with the result that Petitioner´s Centran stock, the basis for his standing to maintain his derivative suit, was no longer in Petitioner´s name.

On November 20, 1984, Petitioner died. His son, Donald Marx was appointed executor of Petitioner´s estate on November 30, 1984. On January 8, 1985, Petitioners´s duly filed petition for rehearing was denied by the Court of Appeals. Upon motion of the Petitioner, showing intention to file petition for writ of certiorari and the need for substitution of party appellant, the Court of Appeals granted a stay of the mandate, with an extension until April 4, 1985. On February 11, 1985, all Respondents joined in a motion to substitute Donald Marx, executor of the estate of Petitioner, as a

substituted party plaintiff-appellant pursuant to F.R.A.P. 43(a), and moved to abate and/or dismiss the derivative action.

In response thereto, Petitioner´s counsel, on behalf of Donald Marx, executor, formally suggested the death of Petitioner, and moved the Court of Appeals for an order directing the Respondents, Central Bank and Centran, to reissue the 200 shares of Centran stock in the name of the Petitioner, and deliver it forthwith, to Donald Marx, executor of the estate of Petitioner, before substituting Donald Marx, executor, as a substituted party plaintiff-appellant, pursuant to F.R.A.P. 43(a).

The motion to reissue, was based on the contentions supported by affidavit and law, that the Respondent, Central Bank as Petitioner´s trustee, where Petitioner is both a settlor and beneficiary of the trust, wrongfully accepted and acquired the 200 shares of Petitioner´s Centran stock for the

following reasons:

The terms of the Petitioner's, insurance inter vivos revocable trust, as written, precluded on its face, the acceptance of stock as part of the trust by Respondent trustee. The Respondent trustee, knew at the time it accepted the Centran stock, of Petitioner's intention to pass the stock by will to his children, because Petitioner handed his will, with such a clause contained therein, for copying, to the trust officer on October 29, 1984, while delivering the stock and stock power. (The will was subsequently probated as the last will and testament of Petitioner.) Under the law, the Respondent trustee is required, when dealing with a beneficiary of the trust in which it has an interest, before accepting the Centran stock, to have Petitioner obtain independent legal counsel in regard to the funding of the insurance trust, which Respondent trustee neglected to do. The

Petitioner, advanced in years, suffering from leukemia, was no longer able to handle his own affairs.

The Court of Appeals has not yet ruled on the Petitioner's forgoing motions. It is therefore assumed herein, that even if it found Petitioner's motion to reissue the stock well taken, that the Court of Appeals for the Sixth Circuit would find, that the stock did not delvolve by operation of law. If so, then its decision would be in conflict with the case of Hirshfield v. Briskin, 447 F.2d 694, decided by the United States Court of Appeals for the Seventh Circuit.

This case held, that F.R.Civ.P 23.1, requiring plaintiff to be a shareholder at the time of the transaction complained of, is satisfied, where the acquisition of stock approximates a devolution by operation of law and did not present the sort of occurrence involving speculation, champerty or collusion to confer jurisdiction. By

inference, this rule would apply in like a manner, to Petitioner's case, where Petitioner is required to maintain his interest in the stock that gives him standing, during the pendency of the case on appeal.

CONCLUSION

The Respondents, all honorable men, bet the bank, by taking a position in United States & State bonds with borrowed funds during a 3 year period, that substantially exceeded the capital and surplus of the bank. They did so for the purpose of improving the bottom line profitability of the bank and its holding company. They did it, at a time when 12 U.S.C. 82, directed them to limit bank borrowing to the capital and 50 percent of the surplus of the bank. They did it when 12 C.F.R. 1.4, enacted under 12 U.S.C. 24, directed them to be prudent in the purchase of United States & State bonds.

The Courts below have held, that none of the above inure to the benefit of the shareholders, for derivative or class action purposes of private federal actions. The Courts below have held, that the Comptroller of the Currency´s regulations 12 C.F.R. 7.1130 et seq., deeming this borrowing by the

bank, a purchase and sale, and 12 C.F.R. 1.4 inure to the benefit of the Respondents, precluding any federal private right of action under the National Banking Act. The Courts below have concluded, that it is a matter of business judgment, resolvable in the state courts of Ohio, with all the other issues under the exclusive control of the Comptroller of the Currency.

From the outset, the Petitioner has maintained, the Respondents have no authority under the National Banking Act to engage in the activity of speculating in long term United States & State bonds with short term borrowed funds, used over a 3 year period as the mode of payment, when it exceeds the bank´s capital and 50 percent of its surplus. The repeal of 12 U.S.C. 82, in 1982, declared by the Courts below to be inapplicable to Petitioner´s case, has removed any and all impediments, to borrowing by the banks with regard to its capital and surplus.

Banks are now free to borrow unlimitedly. Using the vehicle of short term repurchase agreements and overnight funds, collateralized by their excessive purchase of United States & State bonds, they come within this Court´s directive, that borrowing be temporary. Using the banks express right to buy unlimitedly, United States & State bonds, they come within this Court´s directive that the borrowing be safe and prudent.

The boundary lines, if any still exist under the National Banking Act, as to the national banks authority, to borrow under the incidental powers necessary to carrying on the business of banking, have become blurred, as to their excessive purchasing and excessive borrowing transactions in United States & State Bonds.

The number of bank failures have never been so great since the great depression of the 1930´s. The temptation of banks to make up

for a poor bottom line, through speculation in United States & State bonds, is great and prevalent. Ohio is presently having a bank holiday with its savings and loans banks. This question of first impression, is of great public importance, requiring settlement by the United States Supreme Court.

Petitioner urges, that this Court review the authority of the Court of Appeals under F.R.A.P. 43(a), it being one of first impression, to hear and determine Petitioner's motion for return of his stock, before party substitution, under the circumstances herein.

For the reasons set forth here and in the body of this petition, it is respectfully requested, that this petition for writ of certiorari be granted.

Respectfully Submitted,

Donald Weisberger

Donald Weisberger, Counsel of Record
For Petitioner
Suite 1425 - 75 Public Square Bldg.
Cleveland, Ohio 44113
(216) 621-7113

APPENDIX

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed July 22, 1983)

Case No. C82-2720

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SYLVESTER MARX, etc.,
Plaintiff,

v.

CENTRAN CORPORATION, etc., *et al.*,
Defendants.

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date the defendants' joint motion for partial summary judgment is granted; the plaintiff's motion "to limit [the] scope" of the defendant's motion is denied and the remainder of the complaint is dismissed. Such dismissal is without prejudice to the claims alleged in count three of the amended complaint.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

MEMORANDUM OF OPINION OF THE UNITED STATES DISTRICT COURT

(Filed July 22, 1983)

Case No. C82-2720

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SYLVESTER MARX, etc.,
Plaintiff,

v.

CENTRAN CORPORATION, etc., *et al.*,
Defendants.

MEMORANDUM OF OPINION

On October 8, 1982 plaintiff, Sylvester Marx, filed the above-captioned case alleging violations of 12 U.S.C. §§ 24 and 84 and 12 C.F.R. § 1.4 by the following defendants: (1) Centran Corporation (hereinafter, Centran); (2) Central National Bank of Cleveland (hereinafter, CNB); (3) Jack C. Rothwell; (4) John A. Gelbach; (5) Wilson M. Brown, Jr. (6) James M. Large, Jr.; (7) Gordon J. Sevold; (8) Otes Bennet, Jr.; (9) Glenn R. Brown; (10) Joseph T. Gorman; (11) Stephen R. Hardis; (12) William F. Hauserman; (13) Albert M. Higley, Jr.; (14) George S. Lockwood, Jr.; (15) John J. Loftus; (16) Robert D. McCreery; (17) James S. Reid, Jr.; (18) Karl H. Rudolph; (19) Ward Smith; (20) Renald D. Thompson, and (21) Ernest M. Wulliger. On January 26, 1983 Marx filed an amended complaint which, in addition to the statutes and regulation

cited above, alleges violations of 12 U.S.C. §§ 82, 375(b), 1842(d) and 1847. On March 3, 1983 the parties submitted stipulations of fact. On March 10, 1983 the defendants filed a joint motion for partial summary judgment. On May 25, 1983 Marx filed a motion "to limit [the] scope" of the defendants' motion. For the reasons which follow the defendants' joint motion is granted, the motion filed by Marx is denied and the remainder of the complaint is dismissed.

The amended complaint contains three (3) counts: (1) count one alleges a class action on behalf of all holders of common stock of Centran; (2) count two alleges a derivative action "for the benefit of Centran and its wholly owned subsidiary [CNB]"; and (3) count three alleges a pendent claim of breach of fiduciary duty under the laws of Ohio. All counts are premised on the same facts, a synopsis of which follows below.

In 1980 CNB maintained a policy of asset management which permitted an imbalance or "gap" between long-term fixed assets and liabilities and short-term fixed assets and liabilities. This "gap" was managed according to forecasts regarding interest rates. When such forecasts predicted that interest rates would peak and thereafter decline, CNB would purchase securities for its own account with medium and/or long-term dates of maturity at rates of return that were fixed. Such purchases were financed from the proceeds of liabilities with short-term dates of maturity. It was expected that as interest rates declined the short-term liabilities would be "rolled over" at a lower cost, the securities purchased would continue to earn a high rate of return and, therefore, CNB would earn a profit. Obviously, the policy encompassed some risk. If the forecast regarding interest rates proved incorrect and rates on short-term liabilities began to rise, then the cost of the debt could equal and/or exceed the rates of return

on the securities purchased. Although it is unquestioned that if such an upward spiral occurred CNB could sell the securities to reduce the "gap" and restore liquidity, it is equally clear that the market value of the securities would decline as interest rates rose and, therefore, CNB would suffer a loss on any such sale. This is precisely what occurred to CNB's investment portfolio in late 1980 and throughout 1981. The parties stipulate that ". . . as a consequence of negative carrying costs and . . . losses from selling securities at market prices lower than cost/book value . . . damages sustained by CNB . . . exceeded Fifty Million Dollars." Stipulations of Fact, pp. 6-7.

With regard to the parties the following facts are also stipulated:

(1) In 1978 Marx purchased two hundred (200) shares of common stock of Centran. He is one of approximately nine thousand (9,000) shareholders who own over four million (4,000,000) shares of authorized and issued common stock.

(2) Centran is a Delaware corporation which is qualified to do business in Ohio. It is a "bank holding company" as that term is defined in 12 U.S.C. § 1841(a) and owns all of the common stock of CNB.

(3) CNB is a national banking association chartered by the United States. It is a member of the Federal Reserve System and is insured by the Federal Deposit Insurance Corporation (hereinafter, FDIC).

(4) Jack C. Rothwell was an Executive Vice President of CNB and Chairman of the Finance Committee of Centran. He was also manager of the Department of Asset and Liability Management for each organization.

(5) John A. Gelbach was the Chairman of the Board of Directors for each organization. From 1979 until May,

1981 he was also the Chief Executive Officer of Centran. Currently, Gelbach is retired.

(6) Wilson M. Brown, Jr., was President of each organization. In 1979 he became Chief Executive Officer of CNB and in June, 1981 Chief Executive Officer of Centran. He is also a director of each organization.

(7) James M. Large, Jr., was an Executive Vice President of CNB and Manager of the Department of Corporate Banking. In April, 1980 he became Chairman of the Credit Policy Committee of Centran.

(8) Gordon J. Sevold was a Senior Vice President for Financial Planning and Control of CNB. He was also Treasurer of Centran.

(9) From 1979 through 1981 Otes Bennet, Jr., Joseph T. Gorman, Stephen R. Hardis, William F. Hauserman, Albert M. Higley, Jr., George S. Lockwood, Jr., John J. Loftus, Robert D. McCreery, James S. Reid, Jr., Karl H. Rudolph, Ward Smith, Renold D. Thompson and Ernest M. Wuliger were directors of each organization. In 1982 Lockwood and Wuliger did not stand for reelection. Currently, all of the other directors remain on each board.

(10) In 1980 Glenn R. Brown was elected a director on the boards of each organization. Although he did not participate in any of the investment decisions of the Board of Directors of CNB, he did ratify the decisions to liquidate the investment portfolio in 1981 and 1982.

Finally, the parties also submitted certain stipulations which concern a transaction between Centran and Marine Midland Banks, Inc. (herinafter, MMBI), which is not a party to this action.[1] On March 5, 1982 Centran issued

---

1. Similar to Centran, however, MMBI is a "bank holding company" under 12 U.S.C. § 1841(a). It is incorporated in a state other than Ohio and maintains its principal place of business in New York.

five hundred thousand (500,000) shares of preferred stock which were purchased by MMBI for $70,000,000. MMBI also received a warrant to purchase 2,333,333 shares of common stock at $30. per share.

Marx contends that the court should ". . . restrict the scope of the [the] [d]efendants motion . . . to the issue [of] whether [he] and his class have a direct . . . class action and not in any way rule on the merits." For the reasons which follow the court finds the contention to be without merit.

Fed. R. Civ. P. 23(c)(1) provides as follows:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140 (1974), the United States Supreme Court held that what the district court had termed a "preliminary mini-hearing" on the merits of the plaintiffs' claim was not permitted under this rule. Specifically, the Court held:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it.
>
> He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the

> class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such "[a]s soon as practicable after the commencement of [the] action. . . ."

417 U.S. at 177-78, 94 S. Ct. at 2152. Thus, the precise question presented by Marx's motion is whether *Eisen* held *sub silentio* that any consideration of the merits of a case before a determination of whether it may be maintained as a class action is impermissible. The court holds the question should be resolved in the negative.

In *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, 80 F.R.D. 254, 260 (N.D. Ill. 1978), the court was confronted with the same issue and held that when ". . . defendants' summary judgment motions allow the court to explore and define the proper range of judicial inquiry on the allegations of the complaint, *disposition of those motions before certification is appropriate.*" (Emphasis added). *Accord*: *Haas v. Pittsburgh National Bank*, 381 F. Supp. 801, 803 (W.D. Pa. 1974), *aff'd* (*rev'd*) *on other grounds*, 526 F.2d 1083 (3d Cir. 1975), ". . . a district court may consider the merits of a plaintiff's case in an action denominated as a class action by ruling upon a motion for summary judgment (or a motion to dismiss) prior to ruling upon a motion for class determination . . .". (Footnote omitted). A contrary rule, ". . . if carried to a logical extreme, would require certification to precede even disposition of motions under Rule 12." *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, *supra*, 80 F.R.D. at 260. Since such an "extreme" would require the court "to engage in vain and useless effort merely for the sake of form," *Haas v. Pittsburgh National Bank*, *supra*, 381 F.Supp. at 806, Marx's motion "to limit [the] scope" of the defendants' joint motion for summary judgment is denied.

12 U.S.C. § 93(a) provides as follows:

> If the directors of any national banking association *shall knowingly violate, or knowingly permit* any of the officers, agents, or servants of the association to violate any of the provisions of *this chapter*, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, *its shareholders, or any other person*, shall have sustained in consequence of such violation.

(Emphasis added). The defendants' first contention is that the statute does not provide a private right of action to shareholders of a national bank. For the reasons which follow the court holds the defendants' first contention to be without merit.

In *Chesbrough v. Woodworth*, 244 U.S. 72, 76, 37 S. Ct. 579, 582 (1917), the United States Supreme Court affirmed the following ruling by the Court of Appeals for the Sixth Circuit:

> The general demurrer was rightly overruled. The making and publishing of the reports are not merely for the information of the Comptroller, but are to guide the public, and he who buys stock in a bank in reliance upon the reports has a right of action under § 5239, Rev.Stat. (Comp.Stat.1916, § 9831) [section 93(a)], against any officer or director who, knowing its falsity, authorizes such report.

The general demurrer was to a complaint in which a shareholder alleged that directors of national bank violated the provisions of what is currently 12 U.S.C. § 161 which requires that certain reports be made to the Comptroller of Currency. Premised on *Chesbrough*, the Court of Appeals for the Ninth Circuit has held that "it is beyond dispute that under proper circumstances Section 93 creates a direct cause of action by the shareholders against the directors of a national bank." *Harmsen v. Smith*, 542 F.2d 496, 500 (9th Cir. 1976). *Accord*: *Adato v. Kagan*, 599 F.2d 1111, 1117 (2d Cir. 1979), "Individual depositors may sue in their own right . . . if they have suffered a wrong that is distinctly theirs and not common to all"; *Spalitta v. National American Bank of New Orleans*, 444 F.2d 291 (5th Cir.), *cert. denied*, 404 U.S. 883, 92 S. Ct. 212 (1971), (shareholders' derivative and class action); *Seiden v. Butcher*, 443 F. Supp. 384 (S.D. N.Y. 1978), (shareholders' derivative action). Other courts, however, have held that no such standing exists. *See: Russell v. Continental Illinois National Bank & Trust Co., of Chicago*, 479 F.2d 131 (7th Cir.), *cert. denied*, 414 U.S. 1040, 94 S. Ct. 541 (1973), (investors in an "open-end mutual fund" established by the bank); *Gollar v. Daniels & Bell, Inc.*, 533 F. Supp. 1021 (S.D.N.Y. 1982), (shareholders' derivative action); *Stein v. Galitz*, 478 F. Supp. 517 (N.D. Ill. 1978), (private developer of federally subsidized rental housing); *Valente v. Dennis*, 437 F. Supp. 783 (E.D. Pa. 1977), (shareholders of a corporate borrower).

In *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080 (1975), the United States Supreme Court held that four (4) factors are relevant to determine whether a private right of action should be implied under any federal statute. Specifically, the court held:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several

factors are relevant. *First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," Texas & Pacific R. Co. v. Rigsby,* 241 U.S. 33, 39, 36 S. Ct. 482, 484, 60 L.Ed. 874 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? *Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, e.g., National Railroad Passenger Corp. v. National Assn. of Railroad Passengers,* 414 U.S. 453, 458, 460, 94 S. Ct. 690, 693, 694, 38 L.Ed.2d 646 (1974) (*Amtrak*). *Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff : See, e.g., Amtrak, supra; Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412, 423, 95 S. Ct. 1733, 1740, 44 L.Ed.2d 263 (1975); *Calhoon v. Harvey,* 379 U.S. 134, 85 S. Ct. 292, 13 L.Ed.2d 190 (1964). *And finally, is the cause of action one traditionally relegated to state law,* in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? *See Wheeldin v. Wheeler,* 373 U.S. 647, 652, 83 S. Ct. 1441, 1445, 10 L.Ed.2d 605 (1963); *cf. J. I. Case Co. v. Borak,* 377 U.S. 426, 434, 84 S. Ct. 1555, 1560, 12 L.Ed.2d 423 (1964); *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 394-395, 91 S. Ct. 1999, 2003-2004, 29 L.Ed.2d 619 (1971); *id.*, at 400, 91 S. Ct. at 2006 (Harlan, *J.*, concurring in judgment).

422 U.S. at 78, 95 S. Ct. at 2088. (Emphasis added). The Court so held because "[t]he increased complexity of federal legislation and the increased volume of federal litigation strongly supported the desirability of a more careful scrutiny of legislative intent. . .". *Merrill Lynch, Pierce, Fenner & Smith v. Curran,* 456 U.S. 353, 377, 102 S. Ct. 1825,

1838-39 (1982). (Footnote omitted). Although *Cort* "refined the implied remedy doctrine to provide a more efficient means of determining whether a federal statute includes a private right of action," *Kaschak v. Consolidated Rail Corp.*, ... F.2d ....., No. 81-3383, Slip op. at 24 (6th Cir. May 26, 1983), (Celebrezze, J., concurring in judgment), the defendants do not cite and this court is unaware of any authority which holds that it overruled any previous decision which implied such a right. Therefore, in light of *Chesbrough v. Woodworth, supra,* this court holds that shareholders may maintain a private right of action against directors of a national bank under 12 U.S.C. § 93(a) for any knowing violations of "any of the provisions of this chapter."[2] Since 12 U.S.C. § 93(a) provides that such an action may be maintained against directors only and Marx has stipulated that Rothwell, Large and Sevold were never directors, the complaint against them, to the extent it alleges knowing violations of "any of the provisions of this chapter," is dismissed for failure to state a claim upon which relief can be granted. *Conley v. Gibson*, 355 U.S. 41, S. Ct. 99 (1957).

With regard to the defendants who are directors, Marx alleges that they committed knowing violations of 12 U.S.C. §§ 24, 82 and 84, all of which are "provisions of this chapter" for the purpose of 12 U.S.C. § 93(a). The defendants contend that they are entitled to summary judgment under each statute. For the reasons which follow the court finds the defendants' contention persuasive.

12 U.S.C. § 24 provides in pertinent part as follows:

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution

---

2. Subject matter jurisdiction may be implied under either 28 U.S.C. § 1331 or 28 U.S.C. § 1337(a).

of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, *it shall have power—*

. . .

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, *all such incidental powers as shall be necessary to carry on the business of banking;* by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. *The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock. Provided,* That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. In no event shall the total amount of the investment securities of any one obligor or maker, held by the association for its own account, exceed at any time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund, except that this limitation shall not require any association to dispose of any securities lawfully held by it on August 23, 1935. As used in this section the term "investment securities" shall mean marketable obligations, evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes

> and/or debentures commonly known as investment securities under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association for its own account of any shares of stock of any corporation. *The limitations and restrictions herein contained as to dealing in, underwriting and purchasing for its own account, investment securities shall not apply to obligations of the United States, or general obligations of any State or of any political subdivision thereof*, . . .

(Emphasis added). Although it is uncertain "whether the enumeration of powers contained in § 24 itself imposes a duty, the breach of which will form the basis of personal liability of the directors," *Stein v. Galitz, supra,* 478 F. Supp. at 521, the court need not resolve the issue in this case because the parties have stipulated that all of the securities purchased by CNB were "type I securities" which, as a matter of law, are not subject to any of the limitations or restrictions contained in the statute. *See:* 12 C.F.R. § 1.3(c).[3] Accordingly, the defendants' joint motion for summary judgment on Marx's claim under 12 U.S.C. § 24 is granted.

The second statute that Marx claims the defendants knowingly violated is 12 U.S.C. § 82. This statute was

---

3. 12 C.F.R. § 1.3(c) provides as follows:

> *The term "Type I security" means a security which a bank may deal in, underwrite, purchase and sell for its own account without limitation.* These include obligations of the United States, general obligations of any State of the United States or any political subdivision thereof and other obligations listed in paragraph Seventh of 12 U.S.C. 24.

(Emphasis added).

repealed seven days after Marx filed his complaint by the Garn-St. Germain Depository Institutions Act of 1982. Pub. L. No. 97-320, Title IV, § 402, 96 Stat. 1510 (October 15, 1982).

In *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711, 94 S. Ct. 2006, 2016 (1974), the United States Supreme Court held that "a court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Accord*: *Harper-Grace Hospitals v. Schweiker*, 691 F.2d 808, 811 (6th Cir. 1982). In this case the court finds that neither limiting condition exists.

The legislative history which concerns the repeal of 12 U.S.C. § 82 provides as follows:

> *Section 402* repeals 12 U.S.C. § 82, which establishes borrowing limitations for national banks. Statutory limitations on the liabilities of national banks have remained essentially unchanged since original enactment of the National Bank Act of 1864. Since that time, however, the nature of the banking business—especially the manner in which banks are funded—has altered considerably. *The rigid limitations of § 82 adversely restrain bank flexibility and competitively disadvantage national banks.* Many states have no such statutory restraints upon state-chartered institutions.

S. Rep. No. 97-536, 97th Cong., 2d Sess. 60, *reprinted in* [1982] U.S. Code Cong. & Ad. News 3054 at 3114. (Emphasis added). It is unquestioned that Congress found 12 U.S.C. § 82 to be anachronistic. Therefore, the court finds the legislative history supports holding that Marx cannot state a claim under the statute because of repeal.

The court finds further that such a holding does not "result in manifest injustice" because even if Congress did not repeal the statute Marx's complaint would not state a claim under it.

Before it was repealed, 12 U.S.C. § 82 provided as follows:

> No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding *the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, plus 50 percent of the amount of its unimpaired surplus fund, except on account of demands of the nature following*:
>
> First. Notes of circulation.
>
> Second. Moneys deposited with or collected by the association.
>
> Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.
>
> Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.
>
> Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.
>
> Sixth. Liabilities incurred under the provisions of the Federal Deposit Insurance Act.
>
> Seventh. Liabilities created by the indorsement of accepted bills of exchange payable abroad actually owned by the indorsing bank and discounted at home or abroad.
>
> Eighth. Liabilities incurred under the provisions of sections 1031-1033 of this title.

> Ninth. Liabilities incurred on account of loans made with the express approval of the Comptroller of the Currency under paragraph (9) of section 84 of this title.
>
> Tenth. Liabilities incurred under the provisions of section 352 of this title.
>
> Eleventh. Liabilities incurred in connection with sales of mortgages, or participations therein, to the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation.
>
> Twelfth. Liabilities incurred in borrowing from the Export-Import Bank of the United States.

(Emphasis added). The parties have stipulated that the short-term liabilities incurred by CNB were of two (2) types: (1) "Federal Funds Purchased"; and (2) "Repos", which are defined as follows:

> *Federal Funds Purchased*: The Federal Reserve System requires all member banks to maintain on deposit in the Federal Reserve Bank a certain minimum amount. This minimum must be in place at the close of the banking day, to remain overnight. A member bank which has excess deposits overnight can sell them to another member overnight to make up a deficiency in the borrower's minimum. Banks generally sell or purchase "Fed. Funds" daily, and may do both in the same day to arrive at the nightly minimum. The Federal Reserve pays no interest on the member bank's deposit accounts, so that a bank which maintains excess deposits overnight loses interest earnings on those excess deposits. The structure of the "borrowing" is a Sale by the "lending" bank of some of its deposits to the "borrowing" bank which buys that deposit at the close of the day. The "bor-

rower" then sells the bank the purchased funds at the beginning of the next day, but pays back an additional charge for overnight usage which amounts to interest. The Federal Reserve does the bookkeeping based on wire confirmations.

. . .

Repos. The transaction called a "repo", for convenience, is formally structured as a Sale and Repurchase Agreement. A bank which in substance wants to borrow money for a short term, with full security to the lender, can sell the specified security at an agreed price (usually par) to a buyer who pays the full purchase price at once. The buyer then owns the security. At the time of sale the Bank agrees to repurchase the same security for a higher price at the end of a specified term of days or weeks. The difference in price can be translated into an annual interest rate. At the end of the specified term, the original seller buys back the security and pays the original buyer the higher price.

Stipulations of Fact, pp. 12-13.

Before 12 U.S.C. § 82 was repealed, 12 C.F.R. § 7.1130 provided as follows:

When a bank purchases Federal Reserve funds from another bank, the transaction ordinarily takes the form of a transfer from a seller's account in a Federal Reserve Bank to the buyer's account therein, payment to be made by the purchaser, usually with a specified fee. *The transaction does not create on the part of the buyer* an obligation subject to 12 U.S.C. 84 or *a borrowing subject to 12 U.S.C. 82, but is to be considered a purchase and sale of such funds.* But see § 7.7365 for federal funds transactions between affiliates.

(Emphasis added). Similarly, 12 C.F.R. § 7.1131 provided:

> *The purchase or sale of securities by a bank, under an agreement to resell or repurchase at the end of a stated period is not a borrowing subject to 12 U.S.C. 82* nor an obligation subject to the lending limit of 12 U.S.C. 84.

(Emphasis added). Finally, 12 C.F.R. § 7.7518 provided:

> *For purposes of 12 U.S.C. 82, a national bank's indebtedness or liability does not include Federal funds purchased* (see § 7.1130) *obligations to repurchase securities sold* (see § 7.1131), or bills payable to the Federal Reserve (12 U.S.C. 82(5)). Accordingly, for purposes of § 14.5(b) of this chapter, a national bank's indebtedness or liability is determined without regard to such items. Also see §§ 7.7355 and 7.7530.

(Emphasis added). The court finds that these regulations were validly promulgated by the Comptroller of Currency and that they would have precluded Marx's complaint under 12 U.S.C. § 82 had it not been repealed. Accordingly, the defendant's joint motion for summary judgment on Marx's claim under 12 U.S.C. § 82 is granted.

The third statute which Marx claims the defendants knowingly violated is 12 U.S.C. § 84 which, provides in pertinent part as follows:

> (a)(1) *The total loans and extensions of credit by a national banking association to a person outstanding at one time* and not fully secured, as determined in a manner consistent with paragraph (2) of this subsection, by collateral having a market value at least equal to the amount of the loan or extension of credit *shall not exceed 15 per centum of the unimpaired capital and unimpaired surplus of the association.*

(Emphasis added). Specifically, Marx claims that "[t]he borrowing of the monies by [CNB] for the purchase of United States, state and municipal bonds in excess of the statutory authority as well as the purchase of the bonds in and of itself, *constituted a loan from [CNB] to Centran and is in violation of 12 U.S.C. § 84. . . .*". Amended Complaint, p. 8, ¶ 23. (Emphasis added). The court finds Marx's claim to be without merit. It is undisputed that CNB borrowed funds from other banks which are members of the Federal Reserve system and used such funds to purchase securities for its own account. It is equally clear that Centran was not a party to any of the loans nor received any of the securities purchased. To construe either the debt incurred or the securities purchased as "loans" from CNB to Centran is inconceivable. Accordingly, the defendants' joint motion for summary judgment on Marx's claim under 12 U.S.C. § 84 is granted.

Marx also claims that the defendants violated 12 C.F.R. § 1.4 which provides as follows:

> Type I securities are not subject to the limitations and restrictions contained in 12 U.S.C. 24 or in this Part other than §§ 1.3(c), 1.3(g), 1.4, 1.8, 1.9, and 1.11. *Consequently, a bank may deal in, underwrite, purchase, and sell for its own account a security of Type I subject only to the exercise of prudent banking judgment. Prudence will require such determinations as are appropriate for the type of transaction involved.* For the purpose of underwriting or investment, prudence will also require a consideration of the resources and obligations of the obligor and a determination that the obligor possesses resources sufficient to provide for all required payments in connection with the obligations.

(Emphasis added). Since a private right of action, however, may be maintained under 12 U.S.C. § 93(a) only against directors who ". . . knowingly violate or knowingly permit [certain others] . . . to violate any of the provisions of this *chapter* . . .", (emphasis added), and not any *regulation* promulgated pursuant to it by the Comptroller of Currency, Marx states a claim *only* if a private right of action may be maintained under 12 U.S.C. § 93(b) which provides as follows:

> (1) Any national banking association which violates, or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such association who violates *any of the provisions of this title*, or any of the provisions of section 92a of this title, *or any regulation issued pursuant thereto*, shall forfeit and pay a civil money penalty of not more than $1,000 per day for each day during which such violation continues. The penalty may be assessed and collected by the Comptroller of the Currency by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.
>
> (2) In determining the amount of the penalty the Comptroller shall take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the association or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.
>
> (3) The association or person assessed shall be afforded an opportunity for agency hearing, upon request made within ten days after issuance of the notice

of assessment. In such hearing all issues shall be determined on the record pursuant to section 554 of Title 5. The agency determination shall be made by final order which may be reviewed only as provided in paragraph (4). If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(4) Any association or person against whom an order imposing a civil money penalty has been entered after agency hearing under this section may obtain review by the United States court of appeals for the circuit in which the home office of the bank is located, or in the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered or certified mail to the Comptroller. The Comptroller shall promptly certify and file in such court the record upon which the penalty was imposed, as provided in section 2112 of Title 28. The findings of the Comptroller shall be set aside if found to be unsupported by substantial evidence as provided by section 706(2)(e) of Title 5.

(5) If any association or person fails to pay an assessment after it has become a final and unappealable order, or after the court of appeals has entered final judgment in favor of the agency, the Comptroller shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(6) The Comptroller may, in his discretion, compromise, modify, or remit any civil money penalty

which is subject to imposition or has been imposed under this section.

(7) The Comptroller shall promulgate regulations establishing procedures necessary to implement this subsection.

(8) All penalties collected under authority of this section shall be covered into the Treasury of the United States.

(Emphasis added). For the reasons which follow the court holds that such an action may not be maintained.

12 U.S.C. § 93(b) was added to the National Banking Act by the Financial Institutions Regulatory and Interest Rate Control Act of 1978. Pub. L. No. 95-630, Title I, § 103, 92 Stat. 3643 (1978). The legislative history of 12 U.S.C. § 93(b) does not indicate that Congress intended to create a private right of action in favor of anyone. Indeed, the legislative history reflects that the intended beneficiary of the statute was the Comptroller of Currency:

> *The banking agencies have made sound arguments in support of authorization for imposing civil money penalties for violations of laws, rules, and orders. A monetary penalty tied to a violation can give an agency the flexibility it needs to secure compliance by individuals or institutions. Presently, an agency is often faced with the option of having to ignore a violation or imposing a penalty it often considers to be overkill.* A cease-and desist action against an institution or referral of a possible criminal action may be too severe for the criticized action. *Daily money penalties should serve as deterrents to violations of laws, rules, regulations, and orders of the agencies. The bill, for example, provides civil money penalties for violations of:*

1. Section 22 and 23A of the Federal Reserve Act. These sections place limitations on loans by member banks to affiliates and on loans to member bank insiders;

2. Section 19 of the Federal Reserve Act. This section prescribes limitations on the rate of interest paid on deposits and sets reserve requirements for member banks;

3. *The National Banking Act. This act sets the standards for operating national banks*:

4. The Bank Holding Company Act and the Savings and Loan Holding Company Act;

5. Insider loan limitations of state nonmember banks;

6. Final cease-and-desist orders issued by the financial institution regulatory agencies;

7. The nonpreferential loan requirements of Title VIII of the bill;

8. The change in bank or savings and loan control titles of the bill.

The committee has provided that civil money penalties will take effect upon enactment and will only apply to violations which occur after that date. In addition, the provisions require that the penalties may only be assessed and collected by written notice with the opportunity for a hearing under the Administrative Procedure Act and with the right to appeal a decision to the U.S. Circuit Court of Appeals. *There is also a requirement that the agency, in determining the amount of the penalty to be assessed "shall take into account the appropriateness of the penalty with respect to the size of the financial resources and good*

faith of the institution or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require." Your committee believes that these requirements will assure that the agencies are not arbitrary and capricious in their use of civil money penalties.

H. Rep. No. 95-1383, 95th Cong. 2d Sess. 17-18, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9273 and 9289-90. (Emphasis added).

Considering that 12 U.S.C. § 93(b) was enacted to give the Comptroller of Currency power to act against directors or officers of a national bank, the court finds that if a private right of action was intended by Congress it would have expressly provided for one. Since no such provision was enacted and evidence of a contrary intent exists, the court holds that no private right of action may be maintained under 12 U.S.C. §93(b). *See*: *Cort v. Ash, supra.* Accordingly, the defendants' joint motion for summary judgment on Marx's claim under 12 C.F.R. § 1.4 is granted.

Next, Marx claims that the defendants violated 12 U.S.C. § 375b which provides as follows:

(1) No member bank shall make any loan or extension of credit in any manner to any of its executive officers, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, except in the case of such a bank located in a city, town, or village with less than thirty thousand in population, in which case such per centum shall be 18 per centum, or to any company controlled by such an executive officer or person, or to any political or campaign committee the funds or services of

which will benefit such an executive officer or person or which is controlled by such an executive officer or person, where the amount of such loan or extension of credit, when aggregated with the amount of all other loans or extensions of credit then outstanding by such bank to such executive officer or person and to all companies controlled by such executive officer or person and to all political or campaign committees the funds or services of which will benefit such executive officer or person or which are controlled by such executive officer or person, would exceed the limits on loans to a single borrower established by section 84 of this title. For purposes of this paragraph, the provisions of section 84 of this title, shall be deemed to apply to a State member bank as if such State member bank were a national banking association.

(2) No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, or to any company controlled by such an executive officer, director, or person, or to any political or campaign committee the funds or services of which will benefit such executive, director, or person or which is controlled by such executive officer, director, or person, where the amount of such loan or extension of credit, when aggregated with the amount of all other loans or extensions of credit then outstanding by such bank to such executive officer, director, or person and to all companies controlled by such executive officer, director, or person to all political or campaign committees the funds or ser-

vices of which will benefits such executive officer, director or person or which are controlled by such executive officer, director, or person, would exceed an amount prescribed in a regulation of the appropriate Federal banking agency, unless such loan, line of credit, or extension of credit is approved in advance by a majority of the entire board of directors with the interested party abstaining from participating directly or indirectly in the voting.

(3) No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors, or to any person who directly or acting through or in concert with one or more persons, owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, or to any company controlled by such executive officer, director, or person, or to any political or campaign committee the funds or services of which will benefit such executive officer, director, or person or which is controlled by such executive officer, director, or person, unless such loan or extension of credit is made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(4) No member bank may pay an overdraft on an account at such bank of an executive officer or director.

(5) For purposes of this section, an executive officer, director, or person shall be considered to have control of a company if such executive officer, director, or person, directly or indirectly or acting through or in concert with one or more other persons—

(A) owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the company;

(B) controls in any manner the election of a majority of the directors of the company; or

(C) has the power to exercise a controlling influence over the management or policies of such company.

(6) For the purposes of this section—

(A) the term "person" means an individual or company;

(B) the term "company" means any corporation, partnership, business trust, association, joint venture, pool syndicate, sole proprietorship, unincorporated organization, any other form of business entity not specifically listed herein, or any other trust, but shall not include any insured bank or any corporation the majority of shares of which is owned by the United States or by any State;

(C) a person shall be deemed to be a "director" of a member bank or a "person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has power to vote more than 10 per centum of any class of voting securities of a member bank" if such person has such relationship with any bank holding company of which such member is a subsidiary, as defined by the Bank Holding Company Act, or with any other subsidiary of such bank holding company;

(D) a person shall be deemed to be an "officer" of a member bank if such person is an officer of any bank holding company of which such member bank is a subsidiary, as defined by the Bank Holding Company Act, or with any other subsidiary of such bank holding company;

(E) the term "executive officer" has the same meaning assigned such term under section 375a of this title; and

(F) the term "pay an overdraft on an account" means the payment by a member bank of an amount for an account holder in excess of the funds on deposit in the account and does not include a payment of funds by the member bank in accordance with either a written preauthorized, interest-bearing extension of credit specifying a method of repayment or a written preauthorized transfer of funds from another account of the account holder at that bank.

(7) The Board of Governors of the Federal Reserve System may prescribe such rules and regulations, including definitions of terms, as it deems necessary to effectuate the purposes and to prevent evasions of this section. The Board may further prescribe rules providing a reasonable period of time after November 10, 1978, within which the amount of outstanding loans or extensions of credit made prior to November 10, 1978, shall be reduced so as to conform to the limitations of this section.

Since the statute is not a provision of chapter 2 of the National Banking Act, a private right of action may not be maintained under 12 U.S.C. § 93(a).[4] Therefore, the

4. The statute is contained in chapter 3.

first question presented by Marx's claim is whether a private right of action may be maintained at all. For the reasons which follow the court holds the question should be resolved in the negative.

Similar to 12 U.S.C. § 93(b), 12 U.S.C. § 375b was added to the National Banking Act by the Financial Institutions Regulatory and Interest Rate Control Act of 1978. Pub. L. No. 95-630, Title I, § 104, 92 Stat. 3644 (1978). The legislative history which concerns enactment of the statute provides in pertinent as follows:

> Section 104 would amend section 22 of the Federal Reserve Act and place additional restrictions on loans to executive officers, directors and persons who directly or indirectly own or control more than 10 percent of the voting shares of a member bank. The amendment would prohibit loans to an executive officer or 10 percent stockholder (except that this percentum is 18 percent for banks located in communities with less than 30,000 in population), companies controlled by such person, or his political or campaign committees, where the amount of the loan, when aggregated with all other loans outstanding to such person, his controlled companies and his political or campaign committees, would exceed the limits on loans to a single borrower established by section 5200 of the Revised Statutes (10 percent of the capital and surplus of the bank). This limit would be made to apply to national banks and State member banks alike. The amendment would also require the approval of a majority of the Board of Directors of a member bank before a loan could be made by the bank to an executive officer, a director or a 10 percent stockholder, to any company controlled by such a person or to any political or campaign committee of such a person,

where the amount of the loan, when aggregated with all other loans outstanding to such person, his controlled companies and his political or campaign committee, would exceed $25,000. In the case of an executive officer these requirements would be an addition to the existing requirements established by section 22(g) of the Federal Reserve Act. All loans to executive officers, directors and 10 percent stockholders, to companies controlled by such persons and to political or campaign committees of such persons, must be made on substantially the same terms as those prevailing at the time for comparable transactions with other persons.

Member banks would be prohibited from honoring overdrafts of executive officers or directors unless the payment of the overdraft is tied to a written preauthorized extension of credit to such officer or director or to a written preauthorized transfer of funds from another account of such officer or director at the bank. *The Board of Governors would be authorized to prescribe rules and regulations to effectuate the purposes and to prevent evasions of this section, as well as to establish a time period within which bank loans currently outstanding shall be reduced so as to conform to the limitations of this section.*

H. Rep. No. 95-1383, 95th Cong. 2d Sess. 39, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9273 at 9311. (Emphasis added). Upon enactment, a private right of action for violations of certain provisions of chapter 3 of the National Banking Act was recognized under 12 U.S.C. § 503 which provides as follows:

If the directors or officers of any member bank shall knowingly violate or permit any of the agents, officers, or directors of any member bank to violate

> any of the provisions of sections 375, 375a, and 376 of this title or regulations of the board made under authority thereof, or any of the provisions of sections 217, 218, 219, 220, 655, 1005, 1014, 1906, or 1909 of Title 18, every director and officer participating in or assenting to such violation shall be held liable in his personal and individual capacity for all damages which the member bank, its shareholders, or any other persons shall have sustained in consequence of such violation.

See, e.g., Hometowne Builders, Inc. v. Atlantic National Bank, 477 F. Supp. 717 (E.D. Vir. 1979). Rather than amend this statute to include violations of 12 U.S.C. § 375b, however, Congress enacted 12 U.S.C. § 504 which provides in pertinent part as follows:

> (a) Any member bank which violates or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such member bank who violates any provision of section 371c, 375, 375a, 375b, 376 or 503 of this title, or any regulation issued pursuant thereto, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues: Provided, That the agency having authority to impose a civil money penalty, may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under such authority. The penalty may be assessed and collected by the Comptroller of the Currency in the case of a national bank, or the Board in the case of a State member bank, by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(Emphasis added). Once again similar to 12 U.S.C. § 93(b), the legislative history of 12 U.S.C. § 504 indicates that Congress intended to strengthen the powers of various federal agencies charged with enforcement of the National Banking Act as opposed to creation of new private rights of action:

> *Section 101 adds a new section to the Federal Reserve Act which would authorize the Board of Governors, in the case of member banks, and the Comptroller of the Currency, in the case of national banks, to assess civil money penalties against a member or national bank, or an individual participating in the affairs of such a bank, for any violation of sections 22 or 23A of the Federal Reserve Act.* These sections limit loans to insider and affiliates of the bank. *A civil money penalty of not more than $1,000 per day for each violation may be assessed after notice and consideration of the appropriateness of the penalty with respect to the financial resources and good faith of the member bank or person charged, the gravity of the violation, the history of previous violations and the data, views and arguments of the bank or person against whom such civil penalty may be assessed. The person assessed is given a right to an agency determination based on a hearing on the record subject to appeal to a circuit court of appeals.*

H. Rep. No. 95-1383, 95th Cong. 2d Sess. 38, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9273 at 9310. Considering that a private right of action may be maintained under 12 U.S.C. § 503 for violations of 12 U.S.C. §§ 375, 375a and 376, the court finds that if a private right of action under 12 U.S.C. § 375b was intended by Congress, it would have expressly provided for one by including it in the list contained in 12 U.S.C. § 503. Since no such inclusion was made and evidence of a contrary intent

exists, as contained in the enactment and legislative history of 12 U.S.C. § 504, the court holds that no private right of action may be maintained under 12 U.S.C. § 375b. Accordingly, the defendants' joint motion for summary judgment on Marx's claim under 12 U.S.C. § 375b is granted.[5]

Next, Marx claims that the transaction in which Centran sold five hundred thousand (500,000) shares of preferred stock to MMBI for $70,000,000 is violative of 12 U.S.C. § 1842(d). Marx claims further that a private right of action for violations of this statute exists under 12 U.S.C. § 1847. For the reasons which follow the court holds Marx's claims to be without merit.

12 U.S.C. § 1847 provides as follows:

> (a) Any company which willfully violates any provision of this chapter, or any regulation or order issued by the Board pursuant thereto, shall upon conviction be fined not more than $1,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this chapter shall upon conviction be fined not more than $10,000 or imprisoned not more than one year, or both. Every officer, director, agent, and employee of a bank holding company shall be subject to the same penalties for false entries in any book, report, or statement of such bank holding company as are applicable to officers, directors, agents, and employees of member banks for false entries in any books, reports, or statements of member banks under section 1005 of Title 18.

---

5. The court notes that even if a private right of action was implied under 12 U.S.C. § 375b the defendants' joint motion for summary judgment would remain meritorious because, as the court has found previously, neither the debt incurred, nor the securities purchased by CNB, constituted loans or extensions of credit to Centran.

(b)(1) Any company which violates or any individual who participates in a violation of any provision of this chapter, or any regulation or order issued pursuant thereto, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues: *Provided*, That the Board may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under authority of this subsection. The penalty may be assessed and collected by the Board by written notice. As used in the section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(2) In determining the amount of the penalty the Board shall take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the company or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.

(3) The company or person assessed shall be afforded an opportunity for agency hearing, upon request made within ten days after issuance of the notice of assessment. In such hearing all issues shall be determined on the record pursuant to section 554 of Title 5. The agency determination shall be made by final order which may be reviewed only as provided in section 1848 of this title. If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(4) If any company or person fails to pay an assessment after it has become a final and unappealable order, or after the court of appeals has entered final judgment in favor of the Board, the Board shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(5) The Board shall promulgate regulations establishing procedures necessary to implement this subsection.

(6) All penalties collected under authority of this subsection shall be covered into the Treasury of the United States.

Marx has not cited and this court is unaware of any decision which holds that a private right of action may be maintained under this statute. It is unquestioned, however, that courts have held to the contrary. *See*: *State of South Dakota v. National Bank of South Dakota*, 219 F. Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970, 85 S. Ct. 667 (1965). *See also*: *Quaker City National Bank v. Hartley*, 533 F. Supp. 126 (S.D. Ohio 1981). The court has examined these decisions and finds them persuasive. Therefore, the court holds that no private right of action exists under 12 U.S.C. § 1847 for violations of 12 U.S.C. § 1842(d).

Assuming, however, that an action could be maintained under 12 U.S.C. § 1847, Marx's claim would be without merit. 12 U.S.C. § 1842(d) provides as follows:

Notwithstanding any other provision of this section, *no application* (except an application filed as a

> result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act) *shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.* For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

(Emphasis added). Under the statute a bank holding company such at MMBI may not ". . . acquire, directly or indirectly, any voting shares of, interest in, or all of substantially all of the assets of any additional bank [CNB] located outside of the State [New York] in which the operations of . . . [MMBI are] principally conducted . . . unless the acquisition of such shares or assets . . . is specifically authorized by the statute laws of the State in which such bank is located [Ohio], by language to that effect and not merely by implication." Although the statutory proscription is unquestioned, it is clear that it does not apply to the present case because MMBI acquired stock in Centran, a "bank holding company" as

defined in 12 U.S.C. § 1841(a)(1)[6] and not in CNB, a "bank" as defined in 12 U.S.C. § 1841(c).[7] Accordingly, the defendants' joint motion for summary judgment on Marx's claims under 12 U.S.C. §§ 1847 and 1842(d) is granted.

The following assertion is contained in the Stipulations of Fact submitted by the parties: "Plaintiff hereby notifies the Court and the defendants that he intends to add the claim that the actions of the defendants violated 12 U.S.C. § 371c." Stipulations of Fact, p. 10. Similarly, in Marx's Brief in Opposition to Defendants' Motion for

---

6. 12 U.S.C. § 1841(a)(1) provides as follows:

> Except as provided in paragraph (5) of this subsection, *"bank holding company" means any company which has control over any bank* or over any company that is or becomes a bank holding company by virtue of this chapter.

(Emphasis added).

7. 12 U.S.C. § 1841(c) provides as follows:

> *"Bank means any institution* organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands, except an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or an institution chartered by the Federal Home Loan Bank Board, *which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans.* Such term does not include any organization operating under section 25 or section 25(a) of the Federal Reserve Act, or any organization which does not do business within the United States except as an incident to its activities outside the United States. "District bank" means any bank organized or operating under the Code of Law for the District of Columbia. The term "bank" also includes a State chartered bank or a national banking association which is owned exclusively (except to the extent directors' qualifying shares are required by law) by other depository institutions or by a bank holding company which is owned exclusively by other depository institutions and is organized to engage exclusively is providing services for other depository institutions and their officers, directors, and employees.

(Emphasis added).

Partial Summary Judgment, he asserts that on February 6, 1971, when CNB became a wholly-owned subsidiary of Centran, the directors failed to disclose "the pre-emptive rights status of Centran stock" in violation of 15 U.S.C. §§ 77[8] and 78j.[9] The court construes these assertions as if they were plead properly in a motion to amend the complaint. For the reasons which follow such motion is denied.

Fed. R. Civ. P. 15(a) provides as follows:

> Amendments. A party may amend his pleading once as a matter of course at any time before a respon-

---

8. 15 U.S.C. § 77q(a) provides as follows:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

9. 15 U.S.C. § 78j(b) provides as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . .
>
> To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

See also: 17 C.F.R. § 240.10b-5, commonly known as rule 10b-5.

> sive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. *Otherwise a party may amend his pleading only by leave of court* or by written consent of the adverse party; *and leave shall be freely given when justice so requires.* A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(Emphasis added). In *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962), the United States Supreme Court held that to avoid decisions on the merits because of procedural technicalities is contrary to the spirit of the Federal Rules of Civil Procedure and that the leave to amend "shall be freely given when justice so requires" language of Rule 15(a) is a "mandate to be heeded." 371 U.S. at 182, 83 S. Ct. at 230. The Court held further that such determinations are within the discretion of a district judge and that leave to amend a pleading may be denied if premised on certain reasons such as "futility of amendment":[10]

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought

---

10. *See*: *Troxel Manufacturing Co. v. Schwinn Bicycle Co.*, 489 F.2d 968 (6th Cir.), *cert. denied*, 416 U.S. 939, 94 S. Ct. 1942 (1974), in which the Court of Appeals for the Sixth Circuit held that a misconception of law is no excuse for a late presentation of an alternative theory of recovery. In *Troxel*, the court held specifically that to deny a patent licensee's motion to amend its pleadings to assert an alternative ground for recovery, when the only excuse offered for failing to present the theory was that the licensee misconceived the law that was applicable, was not abuse of discretion.

> to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—*such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment,* etc.—the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id. (Emphasis added). For the reasons which follow the court finds that amendment of the complaint in this case would be futile.

Like 12 U.S.C. § 375b, 12 U.S.C. § 371c is not a provision of chapter 2 of the National Banking Act and, therefore, a private right of action may not be maintained under 12 U.S.C. § 93(a). Once again similar to 12 U.S.C. § 375b, the mandates of 12 U.S.C. § 371c are enforced by the Comptroller of Currency and the Board of Governors of the Federal Reserve Board under 12 U.S.C. § 504. Therefore, and for the reasons set out above in the portion of this Memorandum of Opinion which concerns whether a private right of action may be maintained under 12 U.S.C. § 375b, the court holds that a private right of action may not be maintained under 12 U.S.C. § 371c.

Assuming, however, that an action could be maintained under 12 U.S.C. § 371c, Marx's claim would be without

merit. 12 U.S.C. § 371c provides in pertinent part as follows:

> (a) Restrictions on transactions with affiliates—
>
> (1) A member bank and its subsidiaries may engage in a covered transaction with an affiliate only if—
>
> (A) in the case of any affiliate, the aggregate amount of covered transactions of the member bank and its subsidiaries will not exceed 10 per centum of the capital stock and surplus of the member bank; and
>
> (B) in the case of all affiliates, the aggregate amount of covered transactions of the member bank and its subsidiaries will not exceed 20 per centum of the capital stock and surplus of the member bank.

Under 12 U.S.C. § 371c(b)(1)(A), the term "affiliate" is defined in part as "any company that controls the member bank," (*i.e.*, Centran), and under 12 U.S.C. § 371c(b)(7), the term "covered transaction" is defined in part as "a loan or extension of credit to the affiliate." Although it is unquestioned that in all instances other than those for which exceptions are provided in subsections (a)(1)(A) and (B), 12 U.S.C. § 371c would prohibit loans from CNB to Centran, it is equally clear that the statute does not apply to the present case. As this court held when considering Marx's claims under 12 U.S.C. §§ 84 and 375b, to construe either the debt incurred or the securities purchased as "loans" from CNB to Centran is inconceivable. CNB merely borrowed funds funds from other banks, used such funds to invest in securities and, thereafter, suffered losses. It is undisputed that Centran was not a party to any of these transactions. Such facts simply cannot be construed

as a "loan or extension of credit" from CNB to Centran. Accordingly, Marx's motion to amend the complaint to include a claim under 12 U.S.C. § 371c is denied.

Marx also claims that the defendant directors committed certain securities law violations in 1971. Since the Court of Appeals for the Sixth Circuit has held consistently that Ohio's four (4) year statute of limitations[11] for actions in which fraud is alleged applies to claims under section 10b of the Securities Exchange Act of 1934 and section 17a of the Securities Act of 1933," *Connelly v. Balkwill*, 279 F.2d 685 (6th Cir. 1960), in which the statute was applied without discussions; *Nickels v. Koehler Management Corp.*, 541 F.2d 611 (6th Cir. 1976), *cert. denied*, 429 U.S. 1074, 97 S. Ct. 813 (1977); *Carothers v. Rice*, 633 F.2d 7, 13 (6th Cir. 1980), *cert. denied*, 450 U.S. 998, 101 S. Ct. 1702 (1981); *Herm v. Stafford*, 663 F.2d 669, 678, n. 10 (6th Cir. 1981), Marx's claims are barred. Accordingly, Marx's motion to amend the complaint to include claims under 15 U.S.C. §§ 77q and 78j(b) is denied.

Premised on the reasons delineated above the defendants' joint motion for partial summary judgment on

---

11. OHIO REV. CODE ANN. § 2305.09 (Page 1962). The statute provides as follows:

> *An action for any of the following causes shall be brought within four years after the cause thereof accrued:*
>
> (A) For trespassing upon real property.
>
> (B) For the recovery of personal property, or for taking or detaining it.
>
> (C) *For relief on the ground of fraud;*
>
> (D) For an injury to the rights of plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.
>
> If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

(Emphasis added).

count one of the amended complaint is granted. *See:* Fed. R. Civ. P. 56(c); *Smith v. Hudson,* 600 F.2d 60 (6th Cir.), *cert. denied,* 444 U.S. 986, 100 S. Ct. 495 (1979). Further, the court holds that since the defendants did not violate any of the provisions of the National Bank Act for which Marx may maintain a private right of action, it is axiomatic that they are entitled to judgment on the derivative claims alleged as well. Therefore, the only issue which remains for the court is subject matter jurisdiction over the claims raised by count three of Marx's amended complaint in which he alleges that the defendants breached their fiduciary duties to shareholders under the laws of Ohio. For the reasons which follow such claims are dismissed without prejudice.

As reasoned by the United States Supreme Court in *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 86 S. Ct. 1130 (1966), the concept of pendent jurisdiction permits adjudication of claims under state law in conjunction with claims under federal law, if such claims derive from operative facts that are common or are of such a nature that the parties would be expected to litigate them in one proceeding. Whether pendent jurisdiction applies to a claim is discretionary, *United Mine Workers of America v. Gibbs, supra; Coleman v. Casey County Bd. of Edn.,* 686 F.2d 428 (6th Cir. 1982), and in making such a determination a court must engage in "a balancing of the considerations of comity, fairness to the litigants, judicial economy, and the avoidance of needless decisions of state law." *Federman v. Empire Fire & Marine Ins. Co.,* 597 F.2d 798, 809 (2d Cir. 1979). It is unquestioned that if "the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to

state tribunals." *United Mine Workers of America v. Gibbs, supra*, 383 U.S. at 726-727, 83 S. Ct. at 1139. It is equally clear that "if the federal claims are dismissed before trial . . . *the state claims should be dismissed as well.*" *Id.* at 726, 83 S. Ct. at 1139. (Footnote omitted). (Emphasis added). The court finds *United Mine Workers of America v. Gibbs, supra*, dispositive of count three of Marx's complaint.

Accordingly, the defendants' joint motion for partial summary judgment is granted; the plaintiff's motion "to limit [the] scope" of the defendants' motion is denied and the remainder of the amended complaint is dismissed.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

STATUTES AND REGULATIONS INVOLVED

12 U.S.C. § 1

§ 1. Bureau of Comptroller of the Currency

There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds and, under the general supervision of the Board of Governors of the Federal Reserve System, of all Federal Reserve notes, except for the cancellation and destruction and accounting with respect to such cancellation and destruction, of Federal Reserve notes unfit for circulation, the chief officer of which bureau shall be called the Comptroller of the Currency and shall perform his duties under the general directions of the Secretary of the Treasury. As amended May 20, 1966, Pub.L. 89-427, § 1, 80 Stat. 161.

12 U.S.C. § 24(7)*

§ 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such in-

---

*Amendments have not been included, in that they are not relevant, nor have they altered the law upon which Petitioner relies.

cidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: *Provided*, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. In no event shall the total amount of the investment securities of any one obligor or maker, held by the association for its own account, exceed at any time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund, except that this limitation shall not require any association to dispose of any securities lawfully held by it on August 23, 1935. As used in this section the term "investment securities" shall mean marketable obligations, evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association for its own account of any shares of stock of any corporation. The limitations and restrictions herein contained as to dealing in, underwriting and purchasing

for its own account, investment securities shall not apply to obligations of the United States, or general obligations of any State or of any political subdivision thereof, or obligations issued under authority of subchapters I, II, and III of chapter 7 of this title, or issued by the Federal Home Loan Banks or the Home Owners' Loan Corporation, or obligations which are insured by the Federal Housing Administrator pursuant to section 1713 of this title, if the debentures to be issued in payment of such insured obligations are guaranteed as to principal and interest by the United States, or obligations of national mortgage associations: *Provided*, That in carrying on the business commonly known as the safe-deposit business the association shall not invest in the capital stock of a corporation organized under the law of any State to conduct a safe-deposit business in an amount in excess of 15 per centum of the capital stock of the association actually paid in and unimpaired and 15 per centum of its unimpaired surplus.

12 U.S.C. § 82

§ 82. Limit on indebtedness incurred by bank

No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Monies deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

Sixth. Liabilities incurred under the provisions of chapter 14, of Title 15, Commerce and Trade.

Seventh. Liabilities created by the indorsement of accepted bills of exchange payable abroad actually owned by the indorsing bank and discounted at home or abroad.

Eighth. Liabilities incurred under the provisions of sections 1031-1034 of this title.

Ninth. Liabilities incurred on account of loans made with the express approval of the Comptroller of the Currency under paragraph (9) of section 84 of this title.

Tenth. Liabilities incurred under the provisions of section 352a of this title. R.S. § 5202; Dec. 23, 1913, c. 6, § 13, 38 Stat. 264; Sept. 7, 1916, c. 461, 39 Stat. 753; Apr. 5, 1918, c. 45, § 20, 40 Stat. 512; Oct. 22, 1919, c. 79, § 2, 41 Stat. 297; Mar. 4, 1923, c. 252, Title V, § 504, 42 Stat. 1481; Feb. 25, 1927, c. 191, § 11, 44 Stat. 1231; Jan. 22, 1932, c. 8, § 6, 47 Stat. 8; May 20, 1933, c. 35, § 2, 48 Stat. 73; June 19, 1934, c. 653, § 2, 48 Stat. 1107.

§ 82. Repealed. Pub.L. 97-320, Title IV, § 402, Oct. 15, 1982, 96 Stat. 1510.

12 U.S.C. § 84(8)*

§ 84. Limit of liability of any person to bank

The total obligations to any national banking association of any person, copartnership, association, or corporation shall at no time exceed 10 per centum of the amount

---

*Amendments have not been included, in that they are not relevant, nor have they altered the law upon which Petitioner relies.

of the capital stock of such association actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund. The term "obligations" shall mean the direct liability of the maker or acceptor of paper discounted with or sold to such association and the liability of the indorser, drawer or guarantor who obtains a loan from or discounts paper with or sells paper under his guaranty to such association and shall include in the case of obligations of a copartnership or association the obligations of the several members thereof and shall include in the case of obligations of a corporation all obligations of all subsidiaries thereof in which such corporation owns or controls a majority interest. Such limitation of 10 per centum shall be subject to the following exceptions:

(8) Obligations of any person, copartnership, association, or corporation in the form of notes secured by not less than a like amount of bonds or notes of the United States issued since April 24, 1917, or certificates of indebtedness of the United States, treasury bills of the United States, or obligations fully guaranteed both as to principal and interest by the United States, shall (except to the extent permitted by rules and regulations prescribed by the Comptroller of the Currency, with the approval of the Secretary of the Treasury) be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus.

12 U.S.C. § 93

§ 93. Violations of provisions of chapter; forfeiture of franchise; personal liability of directors; civil money penalty

(a) If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to

violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

(b)(1) Any national banking association which violates, or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such association who violates any of the provisions of this title, or any of the provisions of section 92a of this title, or any regulation issued pursuant thereto, shall forfeit and pay a civil money penalty of not more than $1,000 per day for each day during which such violation continues. The penalty may be assessed and collected by the Comptroller of the Currency by written notice. As used in the section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(2) In determining the amount of the penalty the Comptroller shall take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the association or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.

(3) The association or person assessed shall be afforded an opportunity for agency hearing, upon request

made within ten days after issuance of the notice of assessment. In such hearing all issues shall be determined on the record pursuant to section 554 of Title 5. The agency determination shall be made by final order which may be reviewed only as provided in paragraph (4). If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(4) Any association or person against whom an order imposing a civil money penalty has been entered after agency hearing under this section may obtain review by the United States court of appeals for the circuit in which the home office of the bank is located, or in the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered or certified mail to the Comptroller. The Comptroller shall promptly certify and file in such court the record upon which the penalty was imposed, as provided in section 2112 of Title 28. The findings of the Comptroller shall be set aside if found to be unsupported by substantial evidence as provided by section 706(2)(e) of Title 5.

(5) If any association or person fails to pay an assessment after it has become a final and unappealable order, or after the court of appeals has entered final judgment in favor of the agency, the Comptroller shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(6) The Comptroller may, in his discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under this section.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(7) The Comptroller shall promulgate regulations establishing procedures necessary to implement this sub-section.

(8) All penalties collected under authority of this section shall be covered into the Treasury of the United States.

As amended Nov. 10, 1978, Pub.L. 95-630, Title I, § 103, 92 Stat. 3643; Oct. 15, 1982, Pub.L. 97-320, Title IV, § 424 (d)(3), (f), (g), 96 Stat. 1523; Oct. 15, 1982, Pub.L. 97-320, Title IV, § 424(g), as amended Jan. 12, 1983, Pub.L. 97-457, § 24, 96 Stat. 2510.

12 U.S.C. § 1842(d)

(d) Limitation by State boundaries. Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment [enacted July 1, 1966] or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

§ 371c. Loans and other transactions with affiliates

(a) Restrictions on transactions with affiliates. (1) A member bank and its subsidiaries may engage in a covered transaction with an affiliate only if—

(A) in the case of any affiliate, the aggregate amount of covered transactions of the member bank and its subsidiaries will not exceed 10 per centum of the capital stock and surplus of the member bank; and

(B) in the case of all affiliates, the aggregate amount of covered transactions of the member bank and its subsidiaries will not exceed 20 per centum of the capital stock and surplus of the member bank.

(2) For the purpose of this section, any transaction by a member bank with any person shall be deemed to be a transaction with an affiliate to the extent that the proceeds of the transaction are used for the benefit or, or transferred to, that affiliate.

(3) A member bank and its subsidiaries may not purchase a low-quality asset from an affiliate unless the bank or such subsidiary, pursuant to an independent credit evaluation, committed itself to purchase such asset prior to the time such asset was acquired by the affiliate.

(4) Any covered transactions and any transactions exempt under subsection (d) between a member bank and an affiliate shall be on terms and conditions that are consistent with safe and sound banking practices.

(b) Definitions. For the purpose of this section—

(1) the term "affiliate" with respect to a member bank means—

(A) any company that controls the member bank and any other company that is controlled by the company that controls the member bank;

(B) a bank subsidiary of the member bank;

(C) any company—

(i) that is controlled directly or indirectly, by a trust or otherwise, by or for the benefit of shareholders who beneficially or otherwise control, directly or indirectly, by trust or otherwise, the member bank or any company that controls the member bank; or

(ii) in which a majority of its directors or trustees constitute a majority of the persons holding any such office with the member bank or any company that controls the member bank;

(D)(i) any company, including a real estate investment trust, that is sponsored and advised on a contractual basis by the member bank or any subsidiary or affiliate of the member bank; or

(ii) any investment company with respect to which a member bank or any affiliate thereof is an investment advisor as defined in section 2(a)(20) of the Investment Company Act of 1940 [15 USCS § 80a-2(a)(20)]; and

(E) any company that the Board determines by regulation or order to have a relationship with the member bank or any subsidiary or affiliate of the member bank, such that covered transactions by the member bank or its subsidiary with that company may be affected by the relationship to the detriment of the member bank or its subsidiary; and

(2) the following shall not be considered to be an affiliate:

(A) any company, other than a bank, that is a subsidiary of a member bank, unless a determination is made under paragraph (1)(E) not to exclude such subsidiary company from the definition of affiliate;

(B) any company engaged solely in holding the premises of the member bank;

(C) any company engaged solely in conducting a safe deposit business;

(D) any company engaged solely in holding obligations of the United States or its agencies or obligations fully guaranteed by the United States or its agencies as to principal and interest; and

(E) any company where control results from the exercise of rights arising out of a bona fide debt previously contracted, but only for the period of time specifically authorized under applicable State or Federal law or regulation or, in the absence of such law or

(c) Collateral for certain transactions with affiliates. (1) Each loan or extension of credit to, or guarantee, acceptance, or letter of credit issued on behalf of, an affiliate by a member bank or its subsidiary shall be secured at the time of the transaction by collateral having a market value equal to—

(A) 100 per centum of the amount of such loan or extension or credit, guarantee, acceptance, or letter of credit, if the collateral is composed of—

(i) obligations of the United States or its agencies;

(ii) obligations fully guaranteed by the United States or its agencies as to principal and interest;

(iii) notes, drafts, bills of exchange or bankers' acceptances that are eligible for rediscount or purchase by a Federal Reserve Bank; or

(iv) a segregated, earmarked deposit account with the member bank;

(B) 110 per centum of the amount of such loan or extension of credit, guarantee, acceptance, or letter of credit if the collateral is composed of obligations of any State or political subdivision of any State;

(C) 120 per centum of the amount of such loan or extension of credit, guarantee, acceptance, or letter of credit if the collateral is composed of other debt instruments, including receivables; or

(D) 130 per centum of the amount of such loan or extension of credit, guarantee, acceptance, or letter of credit if the collateral is composed of stock, leases, or other real or personal property.

(2) Any such collateral that is subsequently retired or amortized shall be replaced by additional eligible collateral where needed to keep the percentage of the collateral value relative to the amount of the outstanding loan or extension of credit, guarantee, acceptance, or letter of credit equal to the minimum percentage required at the inception of the transaction.

(3) A low-quality asset shall not be acceptable as collateral for a loan or extension of credit to, or guarantee, acceptance, or letter of credit issued on behalf of, an affiliate.

(4) The securities issued by an affiliate of the member bank shall not be acceptable as collateral for a loan or extension of credit to, or guarantee, acceptance, or letter of credit issued on behalf of, that affiliate or any other affiliate of the member bank.

(5) The collateral requirements of this paragraph shall not be applicable to an acceptance that is already fully secured either by attached documents or by other property having an ascertainable market value that is involved in the transaction.

(d) Exemptions. The provisions of this section, except paragraph (a)(4), shall not be applicable to—

(1) any transaction, subject to the prohibition contained in subsection (a)(3) with a bank—

(A) which controls 80 per centum or more of the voting shares of the member bank;

(B) in which the member bank controls 80 per centum or more of the voting shares; or

(C) in which 80 per centum or more of the voting shares are controlled by the company that controls 80 per centum or more of the voting shares of the member bank;

(2) making deposits in an affiliated bank or affiliated foreign bank in the ordinary course of correspondent business, subject to any restrictions that the Board may prescribe by regulation or order;

(3) giving immediate credit to an affiliate for uncollected items received in the ordinary course of business;

(4) making a loan or extension or credit to, or issuing a guarantee, acceptance, or letter of credit on behalf of, an affiliate that is fully secured by—

(A) obligations of the United States or its agencies;

(B) obligations fully guaranteed by the United States or its agencies as to principal and interest; or

(C) a segregated, earmarked deposit account with the member bank;

(5) purchasing securities issued by any company of the kinds described in section 4(c)(1) of the Bank Holding Company Act of 1956 [12 USCS § 1843(c)(1)];

(6) purchasing assets having a readily identifiable and publicly available market quotation and purchased at that market quotation or, subject to the prohibition contained in subsection (a)(3), purchasing loans on a nonrecourse basis from affiliated banks; and

(7) purchasing from an affiliate a loan or extension of credit that was originated by the member bank and sold to the affiliate subject to a repurchase agreement or with recourse.

(e) Rulemaking and additional exemptions. (1) The Board may issue such further regulations and orders, including definitions consistent with this section, as may be necessary to administer and carry out the purposes of this section and to prevent evasions thereof.

(2) The Board may, at its discretion, by regulation or order exempt transactions or relationships from the requirements of this section if it finds such exemptions to be in the public interest and consistent with the purposes of this section.

(As amended Oct. 15, 1982, P. L. 97-320, Title IV, Part A, § 410(b), 96 Stat. 1515; Jan. 12, 1983, P.L. 97-457, § 22, 96 Stat. 2509.)

§ 501a.' Forfeiture of franchise of national banks for failure to comply with provisions of Federal Reserve Act

Should any national banking association in the United States now organized fail within one year after the passage of this Act [December 23, 1913] to become a member bank or fail to comply with any of the provisions of this Act applicable thereto, all of the rights, privileges, and franchises of such association granted to it under the National Bank Act, or under the provisions of this Act, shall be thereby forfeited. Any noncompliance with or violation of this Act shall, however, be determined and adjudged by any court of the United States of competent jurisdiction in a suit brought for that purpose in the district or territory in which such bank is located, under direction of the Federal Reserve Board [Board of Governors of the Federal Reserve System] by the Comptroller of the Currency in his own name before the association shall be declared dissolved.

In cases of such noncompliance or violation other than the failure to become a member bank under the provision of this Act, every director who participated in or assented to the same shall be held liable in his personal or individual capacity for all damages which said bank, its shareholders, or any other person shall have sustained in consequence of such violation.

Such dissolution shall not take away or impair any remedy against such corporation, its stockholders or officers, for any liability or penalty which shall have been previously incurred.
(Dec. 23, 1913, c. 6, § 2, ¶¶ 6, 7, 38 Stat. 251.)

§ 503. Liability of directors and officers of member banks

If the directors or officers of any member bank shall knowingly violate or permit any of the agents, officers, or directors of any member bank to violate any of the provisions of sections 375, 375a, 375b, and 376 of this title or regulations of the board made under authority thereof, or any of the provisions of sections 217, 218, 219, 220, 655, 1005, 1014, 1906, or 1909 of Title 18, every director and officer participating in or assenting to such violation shall be held liable in his personal and individual capacity for all damages which the member bank, its shareholders, or any other persons shall have sustained in consequence of such violation.

(Dec. 23, 1913, c. 6, § 22(f), as added Sept. 26, 1918, c. 177, § 5, 40 Stat. 970, and amended Sept. 3, 1954, c. 1263, § 28, 68 Stat. 1236.)

§ 1846. Reservation of rights to States

The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.
(May 9, 1956, ch 240, § 7, 70 Stat. 136.)

12 U.S.C. § 1849(a)

(a) General rule. Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of existing law, nor shall anything herein contained constitute a defense to any action, suit, or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct, except as specifically provided in this section.

31 U.S.C. § 3102

§ 3102. Bonds

(a) With the approval of the President, the Secretary of the Treasury may borrow on the credit of the United States Government amounts necessary for expenditures authorized by law and may issue bonds of the Government for the amounts borrowed and may buy, redeem, and make refunds under section 3111 of this title [31 USCS § 3111]. The Secretary may issue bonds authorized by this section to the public and to Government accounts at any annual interest rate and prescribe conditions under section 3121 of this title [31 USCS § 3121]. However, the face amount of bonds issued under this section and held by the public with interest rates of more than 4.25 percent a year may not be more than $110,000,000,000.

(b) The Secretary shall offer the bonds authorized under this section first as a popular loan under regulations of the Secretary that allow the people of the United States as nearly as possible an equal opportunity to participate in subscribing to the offered bonds. However, the bonds may be offered in a way other than as a popular loan when the Secretary decides the other way is in the public interest.

(c)(1) When the Secretary decides it is in the public interest in making a bond offering under this section, the Secretary may—

(A) make full allotments on receiving applications for smaller amounts of bonds to subscribers applying before the closing date the Secretary sets for filing applications;

(B) reject or reduce allotments on receiving applications filed after the closing date or for larger amounts;

(C) reject or reduce allotments on receiving applications from incorporated banks and trust companies for their own account and make full allotments or increase allotments to other subscribers; and

(D) prescribed a graduated scale of allotments.

(2) The Secretary shall prescribe regulations applying to all popular loan subscribers similarly situated governing a reduction or increase of an allotment under paragraph (1) of this subsection.

(d) The Secretary may make special arrangements for subscriptions from members of the armed forces. However, bonds issued to those members must be the same as other bonds of the same issue.

(e) The Secretary may dispose of any part of a bond offering not taken and may prescribe the price and way of disposition.

(Sept. 13, 1982, P.L. 97-258, § 1, 96 Stat. 938; Jan. 12, 1983, P.L. 97-452, § 1(5), 96 Stat. 2467.)

12 C.F.R. § 1.4

§ 1.4 Type I securities; standards for authorized transactions.

Type I securities are not subject to the limitations and restrictions contained in 12 U.S.C. 24 or in this Part other than §§ 1.3(c), 1.3(g), 1.4, 1.8, 1.9, and 1.11. Consequently, a bank may deal in, underwrite, purchase, and sell for its own account a security of Type I subject only to the exercise of prudent banking judgment. Prudence will require such determinations as are appropriate for the type of transaction involved. For the purpose of underwriting or investment, prudence will also require a consideration of the resources and obligations of the obligor and a determination that the obligor possesses resources sufficient to provide for all required payments in connection with the obligations.

[36 FR 6737, Apr. 8, 1971]

12 C.F.R. § 7.1130

§ 7.1130 Sale of Federal Reserve funds to another bank.

When a bank purchases Federal Reserve funds from another bank, the transaction ordinarily takes the form of a transfer from a seller's account in a Federal Reserve Bank to the buyer's account therein, payment to be made by the purchaser, usually with a specified fee. The transaction does not create on the part of the buyer an obligation subject to 12 U.S.C. 84 or a borrowing subject to 12 U.S.C. 82, but is to be considered a purchase and sale of such funds. But see § 7.7365 for federal funds transactions between affiliates.

12 C.F.R. § 7.1131

§ 7.1131 Purchase or sale of securities: resale or repurchase agreement.

The purchase or sale of securities by a bank, under an agreement to resell or repurchase at the end of a stated period is not a borrowing subject to 12 U.S.C. 82 nor an obligation subject to the lending limit of 12 U.S.C. 84.

12 C.F.R. § 7.7518

§ 7.7518 Bank indebtedness; Federal funds, securities repurchase agreements, Federal Reserve bills payable.

For purposes of 12 U.S.C. 82, a national bank's indebtedness or liability does not include Federal funds purchased (see § 7.1130) obligations to repurchase securities sold (see § 7.1131), or bills payable to the Federal Reserve (12 U.S.C. 82(5)). Accordingly, for purposes of § 14.5(b) of this chapter, a national bank's indebtedness or liability is determined without regard to such items. Also see §§ 7.7355 and 7.7530.

Ohio Revised Code § 2305,06

Except as provided in section 1302.98 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued.

Rule 23.1. Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Rule 43. Substitution of Parties

(a) Death of a Party. If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by his personal representative, or, if he has no personal representative, by his attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-3602

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SYLVESTER MARX,
Plaintiff-Appellant,

v.

CENTRAN CORPORATION, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed November 8, 1984

Before: MARTIN, JONES and CONTIE, Circuit Judges.

CONTIE, Circuit Judge. Plaintiff Sylvester Marx appeals the district court's grant of summary judgment in favor of the defendants. Marx's complaint alleged that the defendants violated numerous federal banking laws and breached their common law fiduciary duties to the shareholders of Centran Corporation. The district court found that some of the statutes upon which Marx relied created no cause of action which he could assert either directly or derivatively for the benefit of the corporate defendants and that the remaining statutes were not violated by the defendants. Since the federal claims lacked merit, the pendent state law claim alleging a breach of fidu-

ciary duty was dismissed under *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

I.

The parties stipulated to the following facts. Defendant Central National Bank of Cleveland (C.N.B.) is a national banking association chartered by the United States. C.N.B. is also a member of the Federal Reserve System. Defendant Centran is a bank holding company as defined in 12 U.S.C. § 1841(a). Centran owns all of the shares of common stock of C.N.B. and, in addition, owns all or substantially all of the stock of several other Ohio banks. Centran is incorporated in the state of Delaware and is qualified to do business in Ohio. Centran stock has been publicly traded since 1972. Marx bought 200 shares of Centran stock in 1978 on the open market. Centran has approximately 9,000 shareholders and has issued over 4,000,000 shares of common stock. The individual defendants are officers and members of the board of directors of Centran and C.N.B.

This litigation has its origins in an investment scheme undertaken by C.N.B. in 1980. The plan was to obtain leverage by incurring debt during a time of decreasing interest rates and using the assets acquired from the incurred liabilities to buy long-term, fixed-rate governmental obligations. Operating on the assumption that interest rates would fall, C.N.B. believed that the debt required to maintain this portfolio would eventually decrease. That is, the liability would be "rolled over" to progressively lower interest rates. At the same time, the rate of return on the governmental obligations, because it was fixed, would not be affected by the declining interest rates. It was also hoped that the market value of the governmental obligations would rise as interest rates fell.

As events turned out, interest rates did not fall but instead rose and the liabilities were "rolled over" in the wrong direc-

tion, increasing C.N.B.'s short-term liabilities. The rate of interest on the short-term liabilities eventually exceeded the rate of return from the investments they were used to maintain, creating a negative carrying cost. At the same time, the market value of the long-term, fixed-rate governmental obligations fell. This resulted in further losses to C.N.B. when it attempted to liquidate some of its investments. The net result was a loss to C.N.B. of over $50,000,000. These losses sustained by C.N.B. decreased the value of its stock and impaired its ability to pay dividends to Centran. As a result, the value of Centran's stock was diminished and Centran's ability to pay dividends was also restricted.

In order to recapitalize, Centran struck a deal with Marine Midland Banks, Incorporated, a New York bank holding company. In 1982, Centran issued 500,000 shares of nonvoting preferred stock. Marine Midland bought the entire issue for a total sale price of $70,000,000. Marine Midland also received a warrant to purchase 2,333,333 shares of common stock at $30 per share. The money Centran generated from the Marine Midland transaction was used to infuse capital into C.N.B.: Centran paid $55,000,000 for a new issue of nonvoting preferred stock of C.N.B.

The short-term liabilities which C.N.B. incurred in order to finance the purchase of the governmental obligations arose as follows. Although the money used to buy the securities was nominally "borrowed," the precise method of obtaining the funds was more complicated than that characterization might suggest. First, C.N.B. obtained "Federal Funds Purchased." Banks which are a part of the Federal Reserve System are required to maintain a minimum deposit overnight in Federal Reserve Banks to clear drafts. Banks which are short of the minimum overnight deposit at the end of a day often "buy" funds from banks which have a surplus. This benefits both banks. The bank which is short in its deposit account obtains the necessary funds through a simple transaction. Because the overnight accounts pay no interest, the "selling" bank obtains a

return on its capital which it would otherwise lose. At the opening of business the next day, the "borrowing" bank "sells" back the funds to the "lending" bank and pays a charge for the use of the funds which amounts to interest. The second method of obtaining funds was through the use of Sale and Repurchase Agreements, informally known as Repos. When a bank wants a short-term secured loan, it may sell a security to a lender and at the same time agree to repurchase the security at a later date for a higher price. The lender is secured by owning the security and the bank has the use of the capital generated by the sale. The price differential between the sale and the repurchase amounts to an interest payment.

Marx's claims flow from these events. He claims that the investment scheme and the Marine Midland transaction violated several banking statutes and regulations as well as the directors' common law fiduciary duties. He also attempted to add a claim that the 1971 transaction in which Centran acquired C.N.B. violated federal securities laws. Marx claims damages by reason of the diminution in value of his shares of Centran caused by the losses suffered by C.N.B. due to its investment portfolio. Marx also claimed that the Marine Midland transaction was a direct result of the losses incurred in the securities investment program and that the Marine Midland transaction has damaged the shareholders of Centran by diluting their control over the corporation, restricting the common stock dividends and subordinating their liquidation rights.

Marx's complaint was structured as follows. Count I asserted a direct action by Marx and a class consisting of all Centran shareholders. Count II presented the identical claims in the form of a derivative action, "in the right of and for the benefit of Centran and its wholly owned subsidiary, Central National Bank." Count III alleged that the individual directors breached their Ohio common law fiduciary duty "to the corporate Defendants" and asserted a state law derivative claim.

II.

Marx's amended complaint alleged that the defendants violated the following banking statutes and regulations: 12 U.S.C. §§ 24, 82, 84, 375b and 1842(d); 12 C.F.R. § 1.4. We consider these statutes and regulations separately.

A. 12 U.S.C. § 24

The first question that must be addressed under each of the statutes and regulations relied upon by Marx is whether they provide, either expressly or impliedly, a direct cause of action in favor of shareholders such as Marx. Similarly, under Count II, it must be inquired whether the statutes and regulations provide a cause of action in favor of the corporations which may be asserted derivatively by their shareholders.

The district court held that Marx does have a direct and derivative cause of action for alleged violations of 12 U.S.C. § 24. This result is obviously correct. 12 U.S.C. § 93(a) expressly provides that directors of national banks who "knowingly violate" the "provisions of this chapter" of title 12 of the United States Code, "shall be held liable in [their] personal and individual capacity for all damages which *the association, its shareholders, or any other person*, shall have sustained in consequence of such violation."[1] Thus, it is "beyond dispute

---

[1] This section provides in full:

> If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

12 U.S.C. § 93(a).

that under proper circumstances Section 93 creates a direct cause of action by the shareholders against the directors of a national bank." *Harmsen* v. *Smith*, 542 F.2d 496, 500 (9th Cir. 1976) (citing *Chesbrough* v. *Woodworth*, 244 U.S. 72 (1917)). *But see Russell* v. *Continental Illinois National Bank & Trust*, 479 F.2d 131 (7th Cir.), *cert. denied*, 414 U.S. 1040 (1973).[2] Since § 24 is within "this chapter," that is, since both § 24 and § 93 are contained in chapter 2 of title 12 of the United States Code, it is clear that Marx may maintain a cause of action both directly and derivatively for the benefit of Centran for violations of § 24.

The district court correctly determined, however, that the defendants did not violate § 24. That statute provides, in pertinent part:

> The business of dealing in securities and stock by the [national banking] association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock; *Provided*, That the association *may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe.*

12 U.S.C. § 24(seventh) (emphasis added). The statute also provides some specific limitations on a national bank's power to invest in securities. A national bank may not hold investment securities of any single obligor in excess of "10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund."

---

[2] It should be noted that *Russell* did not consider the effect of § 93. Rather, it determined that no implied cause of action existed under § 24 without considering whether any statute expressly created a cause of action.

Id. Section 24 exempts certain governmental obligations from the ten-percent limitation.

> The limitations and restrictions herein contained as to dealing in, underwriting and purchasing for its own account, investment securities *shall not apply to obligations of the United States, or general obligations of any State or any political subdivision thereof* . . . .

Id. (emphasis added). The Comptroller of the Currency has provided regulations implementing these statutory commands. The regulations designate "obligations of the United States, or general obligations of any State or of any political subdivision thereof," referred to in § 24(seventh), as "Type I securities." *See* 12 C.F.R. § 1.3(c). Obligations which may not be characterized as "obligations of the United States, or general obligations of a State or of a political subdivision thereof" are defined as Type II or Type III securities. *See id.*, § 1.3(d), (e). The regulations restate the statutory command that Type I securities are not subject to the ten-percent limitation but that Type II and III securities are. *See* 12 C.F.R. §§ 1.4, 1.7.

The parties stipulated that the bulk of the investment portfolio in question, "about 75%," consisted of Type I securities. As to the Type II and Type III securities, "[n]o single purchase approached the 10% limit." The stipulation further provided that "the Court may assume no violation of 12 C.F.R. 1.1 et seq. with respect to Type II and Type III Municipal Bonds, and treat the Securities Portfolio increase in Municipal Bond holding as though all purchases with short-term borrowings were purchases of Type I securities."[3]

---

[3] The stipulation provided that the term "Municipal Bonds" was intended to include "State, County and Municipality Bonds and Notes." Thus, the stipulation quoted in the text which refers to "Municipal Bonds" included obligations issued by state and county governments, as well as by municipalities.

It is clear from these stipulations that no violation of § 24 (seventh) occurred. Most of the obligations purchased were not subject to the ten-percent limitation and the remaining purchases did not exceed the ten-percent limitation. The district court correctly held that the defendants did not violate 12 U.S.C. § 24(seventh).

B. 12 U.S.C. § 82

12 U.S.C. § 82 is also within chapter 2 of title 12 of the United States Code. Violations of § 82 are therefore within the cause of action created by § 93(a). The district court correctly held that Marx has a direct and a derivative cause of action for violations of this statute.

Marx claimed that the defendants had violated § 82's limitation on the amount of indebtedness a national bank could incur. Marx's complaint was filed on October 8, 1982. After the filing of the complaint and before the district court rendered summary judgment, Congress repealed § 82. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 402, 96 Stat. 1469, 1510 (Oct. 15, 1982).

The district court correctly noted the general rule that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *See Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 711 (1974). The district court concluded that the legislative history indicated that the statute should not be applied after its repeal and that no manifest injustice would result from not applying the statute because it was not violated by the defendants. We agree with these conclusions.

Prior to its repeal, § 82 provided that, subject to certain limitations not relevant here, a national bank could not be indebted in an amount "exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, plus 50 percent of the amount of

its unimpaired surplus fund." *See* 12 U.S.C. § 82 (1976). Marx alleged that the short-term liabilities incurred to finance the investment portfolio exceeded these debt limitations.

The legislative history does not indicate an intention that § 82 should apply after the effective date of its repeal but, to the contrary, reveals that § 82 had become an anachronism and an unnecessary burden upon national banks. In addressing that portion of the legislation which included the repeal of § 82, the Senate Report states:

> Several significant deregulatory provisions are included in the bill to revise or repeal, as appropriate, sections of the national banking laws that are *obsolete and unjustifiably restrictive.* These amendments . . . effect changes that are *long overdue.* . . .
>
> Most significantly, . . . the bill would substantially amend the *arbitrary and inflexible* laws affecting national bank lending and borrowing practices.

See S. Rep. No. 536, 97th Cong., 2d Sess. 25, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3054, 3079 (emphasis added).

We also agree with the district court that applying the repeal of § 82 results in no manifest injustice because the statute as it existed before the repeal was not violated by the defendants. The Comptroller's regulations clearly established that the two types of indebtedness involved in this case, Federal Funds Purchased and Repos, were not to be regarded as debts subject to the limitations of § 82. 12 C.F.R. § 7.1130 (1981) stated that purchasing Federal Reserve Funds "does not create on the part of the buyer . . . a borrowing subject to 12 U.S.C. 82, but is to be considered a purchase and sale of such funds." As to the Repos, 12 C.F.R. § 7.1131 (1981) stated that the "purchase or sale of securities by a bank, under an agreement to resell or repurchase at the end of a stated period is not a borrowing subject to 12 U.S.C. 82."

Finally, 12 C.F.R. § 7.7518 (1981) made it absolutely clear that "[f]or purposes of 12 U.S.C. 82, a national bank's indebtedness or liability does not include Federal Funds Purchased . . . [or] obligations to repurchase securities sold."[4]

Faced with these clear and unambiguous regulations, Marx can only argue that the Comptroller exceeded his authority in determining that Federal Funds Purchased and Repos are not subject to the limitations of § 82 and that the regulations quoted above are therefore invalid. We do not need to decide whether Marx could succeed with this difficult argument.[5] Section 93(a) provides a cause of action only for *"knowing"* violations of the provisions of chapter 2 of title 12. Manifestly, if the applicable regulations authorized the defendants' actions at the time of their conduct, any violation of § 82 could not have been a knowing one. Even if the regulations were invalid, their existence provides the defendants with a defense to an allegation of a knowing violation of § 82. The district court therefore correctly determined that § 82 should not be applied after its repeal.

C. 12 U.S.C. § 84

12 U.S.C. § 84 is also within chapter 2 of title 12 and Marx can therefore assert a direct and derivative cause of action under § 93(a) for violations of its provisions. Section 84 prohibits a national bank from extending unsecured credit to

---

[4] The Comptroller currently treats Repos as borrowings. *See* 12 C.F.R. § 7.7519 (1984). The current regulation is, however, without significance. Since this regulation was promulgated after the repeal of § 82, it clearly was not intended to bring Repos within the limitations of § 82. Rather, it was no doubt intended to make clear that Repos could be borrowings subject to the limitations contained in other provisions of the federal banking laws, such as 12 U.S.C. § 371c, which restricts dealings between "affiliated" banks.

[5] "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

any single entity in an amount exceeding a percentage of the national bank's unimpaired capital and unimpaired surplus.[6] Marx's amended complaint asserted that C.N.B.'s borrowings "constituted a loan from the national bank to Centran . . . in violation of 12 U.S.C. 84." The district court found this construction of the transactions in question to be "inconceivable." We agree.

The paper trail of the transactions is clear. C.N.B. obtained funds by means of Federal Funds Purchased and Repos, used these funds to buy governmental obligations and then held the governmental obligations for itself. Centran never held any of these obligations nor obtained any funds generated by means of Federal Funds Purchased or Repos. The transactions were neither in form nor substance extensions of credit to Centran. Marx has not advanced, nor can we discover, any coherent argument for treating these transactions as loans to Centran.

D. 12 C.F.R. § 1.4

As noted above, most of the securities purchased by C.N.B. were governmental obligations not subject to the limitations contained in 12 U.S.C. § 24(seventh). These "Type I securities" may be invested in by a national bank subject only to the limitation contained in 12 C.F.R. § 1.4, sometimes referred to as the "rule of prudence." Section 1.4 provides in part:

> Type I securities are not subject to the limitations and restrictions contained in 12 U.S.C. 24 . . . . Consequently, a bank may deal in, underwrite, purchase, and

---

[6] The total loans and extensions of credit by a national banking association to a person outstanding at one time and not fully secured . . . by collateral having a market value at least equal to the amount of the loan or extension of credit shall not exceed 15 per centum of the unimpaired capital and unimpaired surplus of the association.

12 U.S.C. § 84(a)(1).

> sell for its own account a security of Type I *subject only to the exercise of prudent banking judgment.*

12 C.F.R. § 1.4 (emphasis added). Marx alleged that the defendants failed to exercise "prudent banking judgment."

12 U.S.C. § 93(a) provides a cause of action only for a violation of the provisions of "this chapter." Since 12 C.F.R. § 1.4 is not a part of chapter 2 of title 12 of the United States Code, Marx clearly has no express cause of action for a violation of that regulation under § 93(a). *See Harmsen* v. *Smith*, 542 F.2d 496, 501 (9th Cir. 1976) (§ 93(a) "does not purport to empower shareholders . . . to initiate direct causes of action . . . with respect to *any* violation of federal banking law." (emphasis in original)). Marx must, therefore, seek to establish that he has an implied cause of action, either directly or derivatively, arising under some other provision of federal banking laws.

Marx relies on 12 U.S.C. § 93(b) to establish his implied right of action. Section 93(b) is unlike § 93(a) in two important respects. First, while § 93(a) speaks only of violations of "the provisions of this chapter," § 93(b) addresses both violations of the "provisions of this chapter" and "any regulation issued pursuant thereto." Second, while § 93(a) expressly provides for a private cause of action for specified violations, § 93(b) is silent on this subject and instead devotes several paragraphs to establishing a procedure whereby the Comptroller of the Currency can assess a civil penalty for the specified violations. 12 C.F.R. § 1.4 is a regulation issued pursuant to chapter 2 of title 12 of the United States Code and is therefore within the general scope of § 93(b). The important question is, however, whether § 93(b)'s creation of certain powers in the Comptroller also creates a private cause of action which Marx may maintain.

We begin our analysis with the premise that the mere "fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause

of action in favor of that person." *See Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979). Rather, the critical question in cases of this type is whether Congress intended to create a cause of action when it enacted the statute in question. *See, e.g., Daily Income Fund, Inc.* v. *Fox*, 104 S. Ct. 831, 839 (1984) ("our focus must be on the intent of Congress when it enacted the statute in question"); *Jackson Transit Authority* v. *Amalgamated Transit Union*, 457 U.S. 15, 21 (1982) ("private right of action decisions address the related question whether Congress intended that a particular party be able to bring suit under a federal statute"); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 377 (1982) ("our focus must be on the intent of Congress"); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15-16 (1979) ("what must ultimately be determined is whether Congress intended to create the private remedy asserted").

As a preliminary matter, we note that the issue arises in a slightly different context than in the usual case. In a typical case in which an implied cause of action is asserted, a plaintiff asserts the cause of action under a federal statute which prohibits, *see, e.g., Cort* v. *Ash*, 422 U.S. 66 (1975), or requires, *see, e.g., Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979), some conduct, or which at least ostensibly protects the rights of a certain class of persons, *see, e.g., Cannon*, 441 U.S. at 689-93. In this case, the statute in question, 12 U.S.C. § 93(b) contains no substantive provisions. Rather, it merely creates a remedy in favor of the Comptroller of the Currency. The substantive provisions Marx relies on are contained in a regulation, not in a statute. It is fundamental that the Constitution grants the power to Congress, and not to the executive branch, to expand federal jurisdiction or to create a new cause of action. It would be misleading, therefore, to state the issue as whether 12 C.F.R. § 1.4 creates an implied cause of action. It is plain that the Comptroller of the Currency is without authority to do so. The true question

is whether Congress, in enacting § 93(b), intended to create a remedy for violations of 12 C.F.R. § 1.4. Accordingly, our analysis focuses primarily on the statute, not on the regulation.

In *Cort*, the Supreme Court identified four factors to be used in discerning congressional intent in cases of this type. The first factor inquires whether the plaintiff is a member of a "class for whose *especial* benefit the statute was enacted." *See* 422 U.S. at 78 (emphasis in original). The second factor inquires whether the legislative history either explicitly or implicitly reveals an intent either to create or deny a private cause of action. *Id.* The third factor determines whether holding that a private right of action exists is consistent with the legislative scheme. *Id.* The fourth factor focuses on whether the cause of action is traditionally "relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." *Id.* The starting point of the analysis is always the language of the statute. *See Jackson Transit*, 457 U.S. at 23; *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1, 13 (1981); *Universities Research Association, Inc.* v. *Coutu*, 450 U.S. 754, 771 (1981); *Touche Ross*, 442 U.S. at 568.

First. Neither the language of 12 U.S.C. § 93 nor of 12 C.F.R. § 1.4 create federal rights for the "especial benefit" of Marx, Centran or C.N.B.;[7] to the contrary, there are affirmative indications in the language of both that no such especial benefit was intended.

Section 93(b) purports only to create a remedy in favor of the Comptroller to enforce the provisions of chapter 2 of title 12 and the regulations issued pursuant to that chapter.

---

[7] Since Marx asserts the rights of Centran and C.N.B. derivatively, it is necessary to determine whether a private cause of action was intended for either of those corporations.

Statutes which have been construed to benefit a discrete class of persons by creating a federal right peculiarly in their favor typically have contained direct language suitable to that end. *See, e.g., Cannon*, 441 U.S. at 689-94 (finding that 20 U.S.C. § 1681(a), which states that "[n]o person . . . shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity receiving Federal financial assistance," "explicitly confers a benefit on persons discriminated against on the basis of sex"). In contrast to cases such as *Cannon*, 12 U.S.C. § 93(b) contains no such language. Also significant is the presence of an express cause of action in § 93(a), which does not mention violations of regulations, and the absence of such a provision in § 93(b), which does address violations of regulations. This difference between the two subsections leads to the conclusion that "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Touche Ross*, 442 U.S. at 572. *See also Middlesex*, 453 U.S. at 14-15. Congress has provided a means for enforcement of regulatory requirements such as 12 C.F.R. § 1.4. Indeed, judging from the mere language of § 93(b), that is the entire purpose of the subsection. "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors*, 444 U.S. at 19.

12 C.F.R. § 1.4 contains only general prescriptive language requiring national banking associations to exercise "prudent banking judgment." It contains no language which directly confers a benefit upon a specific class of persons. Indeed, the very fact that the regulation in question was promulgated by the Comptroller of the Currency makes it highly unlikely that the class of persons which Marx seeks to represent is to be specially benefited by the regulation. The Comptroller is charged with "the execution of all laws passed by Congress relating to the issue and regulation of a national currency

secured by United States bonds . . . and of all Federal Reserve Notes." *See* 12 U.S.C. § 1. The Comptroller is not charged with protecting national banks and their shareholders from imprudent directors. The underlying purpose of 12 C.F.R. § 1.4 must necessarily be to assure the stability of the national currency by preventing national banks from engaging in unsound investments in governmental obligations. Given the Comptroller's statutory authority, it would be illogical to construe 12 C.F.R. § 1.4 as operating to the special benefit of the class of persons which Marx seeks to represent directly and derivatively. *Cf. Cort*, 422 U.S. at 80-82.

Thus, the language of the statute and the regulation indicate that Marx is not representing a class of persons which Congress sought to specially benefit. Moreover, there are positive indications in the language of both that no private cause of action was intended.

Second. An examination of the legislative history of 12 U.S.C. § 93(b) reinforces the conclusion that no private cause of action was intended.

The manifest intent of Congress in enacting § 93(b) was to provide the "financial institution supervisory agencies with additional powers over depository institutions." *See* H.R. Rep. No. 1383, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9273, 9276. Specifically, § 93(b) was added to the National Bank Act to give regulatory agencies more flexibility.

> Regulatory agencies have often contended that their ability to control abuses by insiders and to see that financial institutions are operated in a safe and sound manner are too limited. The hearing records are filled with statements that the agency has the choice of either jawboning – sending letters to officials asking for their cooperation in correcting problems – or using a blunderbuss on the institution. Agency officials have asked for powers which lie somewhere between these two ap-

> proaches so that they can tailor solutions and responses to specific problems and thus more effectively do their job.

See id. at 17, 1978 U.S. Code Cong. & Ad. News at 9289.

While this legislative history certainly reveals no intent to create a private cause of action, we cannot say that it affirmatively expresses an intent to deny a cause of action. Where a statute creates a federal right for the special benefit of a class of persons, the absence in the legislative history of an expressed intent to create a cause of action does not indicate that a private cause of action does not exist. *See Cort*, 422 U.S. at 82. Where, however, the statute does not operate to the special benefit of a certain class, the absence in the legislative history of an expressed intent to create a cause of action will be taken as an affirmative indication that none was, in fact, intended. *See Touche Ross*, 442 U.S. at 571; *Cort*, 422 U.S. at 82-84. As the Supreme Court has stated:

> [W]here, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that § 17(a) may give rise to suits for damages reinforces our decision not to find such a right of action implicit within the section.

Touche Ross, 442 U.S. at 571.

Third. We also conclude that it would be inconsistent with the legislative scheme to infer a cause of action.

The underlying theme of both § 93(b) and 12 C.F.R. § 1.4 is that the Comptroller of the Currency is wisely to exercise a considerable amount of discretion. The regulation establishes a flexible standard of "prudent banking judgment." The statute provides:

> In determining the amount of the penalty the Comptroller shall take into account the appropriateness of the penalty with respect to the size of the financial re-

> sources and good faith of the association or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.

12 U.S.C. § 93(b)(2). Similarly, § 93(b)(6) provides that the "Comptroller may, in his *discretion,* compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under this section." The Comptroller's final decision is subject to only limited judicial review: the Comptroller's findings are to be upheld if supported by substantial evidence. *See* 12 U.S.C. § 93(b)(4).

Inferring a private cause of action would be inconsistent with this comprehensive scheme. A court, not the Comptroller, would be put in the position of making the initial determination of what is prudent banking judgment. The careful assessment of the factors which the Comptroller considers under § 93(b)(2) would be lost. A court would not be sitting in review of the Comptroller's decision under the narrow "substantial evidence" standard, but would instead be determining the matter de novo. In short, inferring a cause of action would substantially interfere with Congress' detailed enforcement scheme.

Fourth. The soundness of a corporate director's business decisions and the right of a shareholder to recover either directly or derivatively for imprudent business decisions is a matter traditionally relegated to state law. The relationship between federal statutory law and state law governing the duty of a corporate director to the corporation and its shareholders was discussed in *Cort*:

> Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation. If, for example, state law permits

> corporations to use corporate funds as contributions in state elections . . . shareholders are on notice that their funds may be so used and have no recourse under any federal statute. We are necessarily reluctant to imply a federal right to recover funds used in violation of a federal statute where the laws governing the corporation may put a shareholder on notice that there may be no such recovery.

Cort, 422 U.S. at 84-85.

In conclusion, each of the *Cort* factors leads to the conclusion that Congress did not intend to create a private cause of action for violations of 12 C.F.R. § 1.4 when it enacted § 93(b).[8]

E. 12 U.S.C. § 375b

12 U.S.C. § 375b generally prohibits national banks from making loans to certain insiders, such as officers of the national bank or individuals or companies owning over a certain percentage of the bank's stock. Marx again asserts that C.N.B.'s investment scheme amounted to a loan from C.N.B. to Centran. The district court found that Marx had no express or implied cause of action for violations of § 375b. Alternatively, the district court held, as it had under Marx's 12

---

[8] 12 U.S.C. § 24(seventh) provides that a national banking association has all incidental powers necessary to its business, "subject to law." Marx argues that the requirement that a national bank exercise its incidental powers "subject to law" incorporates the rule of prudence contained in 12 C.F.R. § 1.4 into 12 U.S.C. § 24(seventh). He thus argues that a violation of 12 C.F.R. § 1.4 is also a violation of 12 U.S.C. § 24(seventh) and is therefore within the express cause of action created by 12 U.S.C. § 93(a). We reject this argument.

We have already concluded that Congress intended that violations of the rule of prudence were to be acted upon only by the Comptroller of the Currency. The mere existence of the phrase "subject to law" within 12 U.S.C. § 24(seventh) is too slender a basis for overriding this clearly expressed legislative intent. Moreover, it is not at all clear that the word "law" as it appears in § 24(seventh) was meant to refer to regulations as well as statutory "law."

U.S.C. § 84 claim, that C.N.B. did not, in fact, make any loan to Centran.

The district court's holding that Marx had no cause of action was erroneous. Section 375b is contained in chapter 3 of title 12, as a part of the Federal Reserve Act. Section 93(a), which provides a cause of action only for violations of chapter 2 of title 12, does not provide a cause of action for violations of § 375b. A cause of action for such violations is, however, provided by 12 U.S.C. § 503. That statute states:

> If the directors or officers of any member bank shall knowingly violate or permit any of the agents, officers, or directors of any member bank to violate any of the provisions of sections 375, 375a, *375b,* and 376 of this title or regulations of the board made under authority thereof . . . every director and officer participating in or assenting to such violations shall be held liable in his personal and individual capacity for all damages which the member bank, its shareholders, or any other persons shall have sustained in consequence of such violation.

12 U.S.C. § 503 (emphasis added).[9]

The district court's error, however, was not attributable to a misreading of the statute, but rather to an error in codification. At one time, the codified version of § 503 contained no reference to § 375b. *See* 12 U.S.C. § 503 (1976); *Lode* v. *Leonardo*, 557 F. Supp. 675, 677 (N.D. Ill. 1982) ("section 375b . . . is not included among the sections listed in the United States Code at 12 U.S.C. § 503"). We need not detail the reason for the compiler's error.[10] It suffices to say that

---

[9] C.N.B. is a member of the Federal Reserve System and is thus a "member bank" within the meaning of 12 U.S.C. § 503. *See* 12 U.S.C. § 221.

[10] The source of the error was explained in *Lode*:

> An examination of 12 U.S.C. § 503 reveals that it expressly grants a private remedy for violations of sections 375, 375a,

§ 375b is now listed in the United States Code as one of those sections for which an express cause of action is provided.[11]

We affirm the district court's conclusion, however, that there was no violation of § 375b. As explained earlier in our discussion of 12 U.S.C. § 84, it is "inconceivable" that the transaction in question amounted to a loan from C.N.B. to Centran.

> and 376. But section 375b, added to section 22 of the Federal Reserve Act in 1978 . . . is not included among the sections listed in the United States Code at 12 U.S.C. § 503. The plaintiffs seek to overcome this difficulty by pointing out that the original version of 12 U.S.C. § 503, which appears in the Statutes at Large as subsection (f) of section 22 of the Federal Reserve Act, does not enumerate the particular provisions of the Federal Reserve Act to which it applies. Instead, the original version uses the general term "this section," referring to all of the provisions of section 22 of the Federal Reserve Act, to designate the provisions within its scope. Thus, since 12 U.S.C. § 375b was made a part of section 22 of the Federal Reserve Act when it was added in 1978, the plaintiffs argue that section 375b is within the scope of section 503 even though not enumerated in the codified version of that statute.
>
> It appears that the plaintiffs are correct on this point. The Statutes at Large control when a version of a law appearing in the United States Code is inconsistent with that in the original statutes. . . . A fair reading of the original version of 12 U.S.C. § 503, as it appears in the Statutes at Large, leads to the conclusion that the private remedy it provides is applicable to all provisions of section 22 of the Federal Reserve Act, including the provision added in 1978 which is now codified at 12 U.S.C. § 375b.

Lode, 557 F. Supp. at 677 (citations omitted).

[11] Because of the compiler's error, the district court focused its analysis on whether an implied cause of action could be inferred from § 503 and § 504. It held that these two sections relate to § 375b in substantially the same manner that §§ 93(a) and (b) relate to 12 C.F.R. § 1.4. That is, it held that the absence of any express cause of action in § 503, under the version of the statute that the district court was relying on, and the express remedy created in favor of the Comptroller of the Currency under § 504 precluded any inference of an implied cause of action for violations of § 375b. Since we find an express cause of action under § 503, we need not address the validity of the district court's ruling that no cause of action could be inferred under § 504.

F. 12 U.S.C. § 1842(d)

Marx alleges that the transaction in which Marine Midland acquired stock and stock warrants of Centran violated 12 U.S.C. § 1842(d). He asserts a cause of action under 12 U.S.C. § 1847. The district court ruled that Marx had no cause of action and, in the alternative, that even if Marx did have a cause of action, § 1842(d) was not violated. We affirm the conclusion that Marx lacked a cause of action and do not reach the question of whether § 1842(d) was violated.

12 U.S.C. § 1842(d) provides in general that the Federal Reserve Board may not approve a bank holding company's application to acquire a subsidiary bank if the holding company will thereby acquire "directly or indirectly" any "interest" in a bank outside the state in which the operations of the holding company's banking subsidiaries are conducted, unless the state of the bank being acquired consents to such an acquisition.

Marx has not identified any provision granting him an express cause of action for acquisitions undertaken in violation of § 1842(d). Rather, he relies on 12 U.S.C. § 1847 to establish an implied cause of action. Much of the preceding discussion of 12 U.S.C. § 93 applies with equal force to 12 U.S.C. § 1847. Subsection (a) provides for criminal penalties for violations of the statutes contained in chapter 17 of title 12 and the regulations issued thereunder. Subsection (b) provides for a civil penalty for violations of the same laws and regulations and establishes a procedure for the Board of Governors of the Federal Reserve System to assess these penalties. In a manner similar to § 93(b), § 1847(b) provides for discretion in assessing the civil penalty. Judicial review of the Board's determination is provided in 12 U.S.C. § 1848 for "[a]ny party aggreived." The scope of review is limited: "The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive." *Id.*

The language of § 1842(d) and § 1847 clearly do not create a federal right for the special benefit of Marx's class. Section 1842(d) merely places a limit on the Board's powers to approve acquisitions of subsidiary banks by bank holding companies; § 1847(a) merely provides a criminal penalty for violations of the Bank Holding Company Act and regulations issued pursuant thereto; § 1847(b) merely grants civil enforcement powers to the Board of Governors of the Federal Reserve System. The Supreme Court has made it clear that,

> there "would be far less reason to infer a private remedy in favor of individual persons" where Congress, rather than drafting the legislation "with an unmistakable focus on the benefited class," instead has framed the statute simply as a general prohibition or a command to a federal agency.

Coutu, 450 U.S. at 772 (quoting *Cannon*, 441 U.S. at 690-92). Section 1842(d) is merely a "general prohibition or a command to a federal agency." Section 1847(b) similarly purports only to grant a remedy in favor of a federal agency. Section 1847(a) provides for criminal sanctions for violations of the Bank Holding Company Act. Although the "provision of a criminal penalty does not necessarily *preclude* implication of a private cause of action for damages," *see Cort*, 422 U.S. at 79 (emphasis in original), where there is a "bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone," *see id.* at 80, a private cause of action will not be inferred.

The legislative history of the Bank Holding Company Act reveals that the Act was intended as a general public welfare statute. The express purpose of the Act was to regulate "the growth of bank holding companies" for the "*public welfare.*" *See* S. Rep. No. 1095, 84th Cong., 2d Sess. 1, *reprinted in* 1956 U.S. Code Cong. & Ad. News 2482 (emphasis added). Congress was concerned with the "undue concentration of

control of banking activities," *see id.*, not with the well-being of national banks, bank holding companies or their shareholders.[12]

Section 1847(b) was added in 1978 as a part of the same legislation that contained § 93(b). *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 103, 92 Stat. 3641, 3643 (amending 12 U.S.C. § 93 by adding subsection (b)); *id.*, § 106, 92 Stat. 3647 (amending 12 U.S.C. § 1847 by adding subsection (b)). The legislative history noted above for § 93(b) is thus equally applicable to § 1847(b). *See, e.g.*, H.R. Rep. No. 1383, 95th Cong., 2d Sess. 17, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9273, 9289. Section 1847(b) was intended to add flexibility to the Board's enforcement powers, not to create a federal right in favor of national banking associations and their shareholders.

While monopolistic tendencies were Congress' primary concern in enacting the Act, we cannot find any conclusive expression of legislative intent to deny a private cause of action. Since, however, the language of the statutes indicates that no private cause of action was intended, the absence of any expressed intent to create a remedy "reinforces" the conclusion that none was intended. *See Touche Ross*, 442 U.S. at 571.

Inferring a private cause of action would also be disruptive of the legislative scheme considered as a whole. The similar-

---

[12] The Supreme Court reached a similar conclusion from its reading of the same legislative history.

> The Bank Holding Company Act of 1956 was enacted to accomplish two primary objectives. First, it was designed to prevent the concentration of banking resources in the hands of a few financial giants. Second, it was intended to implement a congressional policy against control of banking and nonbanking enterprises by a single business entity. . . . *Underlying both objectives was a desire to prevent anticompetitive tendencies* in national credit markets.

Lewis v. *B.T. Investment Managers, Inc.*, 447 U.S. 27, 46 (1980) (citations omitted, emphasis added).

ities between the civil enforcement scheme established in 12 U.S.C. § 93(b) and in § 1847(b) make our analysis of the former statute relevant here. Because of the degree of discretion granted to the Board and the limited judicial review, we conclude that inferring a cause of action would be inconsistent with, indeed disruptive of, the legislative scheme. This is particularly true when it is considered that "any person aggrieved" by a decision of the Board may seek judicial review under 12 U.S.C. § 1848. *Cf. Middlesex*, 453 U.S. at 13-15.

Finally, although regulation of bank holding companies is not an area traditionally relegated to the states, this factor alone does not compel a conclusion that a private cause of action was intended. Although the Court in *Cort* listed four factors to be considered in cases of this type, "the Court did not decide that each of these factors is entitled to equal weight." *See Touche Ross*, 442 U.S. at 575. Where the first three *Cort* factors indicate that no cause of action was intended, the mere fact that this legislation is in an area not traditionally relegated to state law cannot change that result.

Finally, we note decisions consistent with this result. *See State of South Dakota* v. *National Bank of South Dakota*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965); *Quaker City National Bank* v. *Hartley*, 533 F. Supp. 126 (S.D. Ohio 1981).

III.

In the parties' stipulations of fact, Marx informed the district court that he intended to add claims th t the defendants had violated 12 U.S.C. § 371c. In Marx's response to the defendants' motion for summary judgment, he alleged for the first time that the 1971 transaction in which C.N.B. became a subsidiary of Centran violated 15 U.S.C. §§ 77q and 78j. Marx alleged that the defendants failed to disclose the absence of any preemptive rights in Centran stock to C.N.B. shareholders.

The district court treated these assertions as motions to amend Marx's complaint. Since Marx had already taken advantage of the opportunity afforded to all litigants to amend their complaint once as of right, *see* Fed. R. Civ. P. 15(a), these further amendments could be obtained only by leave of the court or upon the consent of the defendants, *see id.* Rule 15 states, however, that leave to amend "shall be freely given when justice requires." The district court correctly noted that in *Foman* v. *Davis*, 371 U.S. 178 (1962), the Supreme Court held that leave to amend should normally be granted unless there is some "apparent or declared reason" to not allow the amendment. *See id.* at 182. One "apparent" reason for not allowing an amendment is "futility of amendment." *Id.* The district court held that allowing Marx to amend his complaint to add these claims would be futile because they lacked any substantial merit. In reviewing a district court's denial of a motion to amend a complaint, the reviewing court operates under an abuse of discretion standard. *Id.* We find no abuse of discretion in this case.

12 U.S.C. § 371c restricts a bank which is a member of the Federal Reserve System from engaging in certain "covered transactions." These transactions include extending credit to an "affiliate." *See* 12 U.S.C. § 371c(b)(7)(A). An "affiliate" includes a holding company. *See id.*, (b)(1)(A). The thrust of Marx's argument here is that C.N.B.'s borrowings and investments amounted to a loan to Centran. The district court correctly held that allowing this amendment would be futile because there was, in fact, no such loan.[13]

---

[13] The district court held in the alternative that Marx had no cause of action for violations of 12 U.S.C. § 371c. The district court adopted the analysis it had earlier used under 12 U.S.C. § 504 when it had considered Marx's claim under 12 U.S.C. § 375b. *See supra* note 11. The district court apparently overlooked, however, 12 U.S.C. § 501a which provides an express cause of action. That section provides, in part:

> Should any national banking association within the United States now organized fail within one year after December 23,

The district court held that an amendment to add claims of violations of 15 U.S.C. §§ 77q and 78j would be futile because the statute of limitations on those claims had run. This circuit has repeatedly applied Ohio's four-year general statute of limitations for fraud actions to suits of this type. *See, e.g., Nickels* v. *Koehler Management Corp.*, 541 F.2d 611 (6th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977). Although state law provides the statute of limitations, the date on which the statute begins to run is a matter of federal law. *Herm* v. *Stafford*, 663 F.2d 669, 682 (6th Cir. 1981). The period of limitations commences when the "fraud is or should have been discovered." *Id.* (quoting *Vanderboom* v. *Sexton*, 422 F.2d 1233, 1240 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970)). An investor is charged with being "at least a person of ordinary intelligence," with exercising "reasonable care," and with a "duty to use diligence in discovering the existence of a cause of action." *Herm*, 663 F.2d at 682.

The alleged nondisclosure in this case dates back to February of 1971. In February of 1972, Centran issued a prospectus which stated that "[t]here are no . . . preemptive rights with respect to Centran's Common Stock." Additionally, Marx

---

1913, to become a member bank [of the Federal Reserve System] *or fail to comply with any of the provisions of this chapter applicable thereto*, all of the rights, privileges, and franchises of such association granted to it under the National Bank Act, or under the provisions of this chapter, shall be thereby forfeited. . . . In cases of such noncompliance or violation, other than the failure to become a member bank under the provisions of this chapter, *every director who participated in or assented to the same shall be held liable in his personal or individual capacity for all damages which said bank, its shareholders, or any other person shall have sustained in consequence of such violation.*

See 12 U.S.C. § 501a (emphasis added).

Since we hold that the district court was correct in not allowing the amendment to add a claimed violation of § 371c because Marx had no substantial claim on the merits and because 12 U.S.C. § 501a expressly provides a private cause of action for violations of § 371c, we need not address the propriety of the district court's holding that Marx had no implied cause of action under § 504.

bought his shares of Centran stock in February of 1978, well over four years before the complaint was filed in this case. Under these circumstances, we hold that the exercise of reasonable care and diligence by an investor of ordinary intelligence would have led to the discovery that Centran stock carried no preemptive rights not later than the time of the investor's purchase of that stock. The district court correctly determined that Marx's proposed securities law claims would be time-barred.[14]

The district court therefore correctly denied Marx's motion to amend his complaint to add these claims.

IV.

Marx raises several other arguments against the district court's dismissal of the entire action. These may be disposed of briefly.

First, Marx argues that the district court was required to determine whether his complaint could properly be maintained as a class action before it could rule on the merits of the case. To establish this proposition, Marx relies on cases such as *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974), and *Weathers* v. *Peters Realty Corp.*, 499 F.2d 1197, 1201 (6th Cir. 1974). These cases do not support Marx's position. They merely stand for the proposition that when a district court is determining whether a class action may properly be maintained under Federal Rule of Civil Procedure 23, the relative merits of the underlying dispute are to have no impact upon the determination of the propriety of the class action. These cases do not establish a broad rule that in all

---

[14] Marx also appears to argue that by not disclosing the absence of preemptive rights Centran created preemptive rights in its common stock. Marx thus argues that the Marine Midland transaction deprived Centran shareholders of vested preemptive rights. This presents, however, only a pendent state law claim. The district court acted within its discretion in dismissing this pendent claim after finding that the federal claims lacked merit. *See United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966).

cases the determination of the propriety of a class action must precede any consideration of the merits. It has never been doubted that a complaint asserting a class action could be dismissed on the merits before determining whether the suit could be maintained as a class action. *See, e.g., Jacobs* v. *Gromatsky*, 494 F.2d 513, 514 (5th Cir.), *cert. denied*, 419 U.S. 868 (1974). *Miller* v. *Mackey International, Inc.*, 452 F.2d 424, 428-29 (5th Cir. 1971). To require notice to be sent to all potential plaintiffs in a class action when the underlying claim is without merit is to promote inefficiency for its own sake. In short, the class action allegations in Marx's complaint presented no impediment to the district court's grant of summary judgment.

Second, Marx argues that the district court could not properly dismiss Count II because the stipulation of facts filed by the parties were expressly limited to the claims under Count I. Marx has not identified, however, any new facts or theories he would develop under Count II. Moreover, the only difference between Count II and Count I is that the former is brought as a derivative action and the latter is brought as a direct action; the underlying claims and legal theories are identical as to each Count. Whether Marx has a cause of action for violations of 12 C.F.R. § 1.4 and 12 U.S.C. § 1842(d) is purely a legal question, not dependent upon any factual findings. The preceeding analysis reveals that Marx had neither a direct nor derivative implied cause of action for such violations. Similarly, no additional stipulations could change the fact that 12 U.S.C. § 82 has been repealed and that Marx's claim predicated upon a violation of that section must fail, whether brought directly or derivatively. Marx's claims under 12 U.S.C. §§ 84, 375b, and 371c are all predicated upon C.N.B. having made a loan to Centran. The entire transaction which Marx claims gave rise to this loan has been stipulated to and Mark has not identified what new facts he might attempt to assert, whether by affidavit or otherwise, which would lead to a finding that C.N.B.

had made such a loan. Finally, Marx's claim under 12 U.S.C. § 24 was predicated on C.N.B. having invested in certain types of securities which, under Count I, Marx stipulated that they had not invested in. Again, Marx has not identified what new facts he would attempt to prove to change the result of his claim under § 24. Had Marx identified further factual issues germain to this action our result might be different. But in the current posture of the case, we conclude that the district court correctly granted summary judgment as to Count II.

Finally, Marx argues that the district court erred in dismissing Count III. The court dismissed this count, which raised pendent state law claims, under the discretionary powers recognized in district courts by *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). *Gibbs* held that "if the federal claims are dismissed before trial . . . the [pendent] state claims should be dismissed as well." *Id.* at 726. This is precisely what happened in this case and the district court was operating well within its discretion when it dismissed the pendent state law claims.

V.

For the reasons stated above, the judgment of the district court is AFFIRMED.

FILED

NOV 21 1984

JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NO. 83-3602

SYLVESTER MARX, Individually, and as a shareholder of Central Corporation, on behalf of Centran Corporation and all others similarly situated,

Plaintiff-Appellant,

v.

CENTRAN CORPORATION, et al.,

Defendants-Appellees.

DENIED
EXTENSION
GRANTED TO 12-7-84
Entered by the Clerk pursuant to Rule 4(f), Sixth Cir. Rules:
John P. Hehman
CLERK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

MOTION FOR A 14 DAY ENLARGEMENT OF TIME
TO FILE APPELLANT'S MOTION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

FOR APPELLANT:

EUGENE BLEIWEISS
Suite 1425
75 Public Square Building
Cleveland, Ohio 44113
(216) 621-7110

DONALD WEISBERGER
Suite 1425
75 Public Square Building
Cleveland, Ohio 44113
(216) 621-7113

FOR APPELLEES:

SPANGENBERG, SHIBLEY, TRACI & LANCIONE

By: Craig Spangenberg
1500 National City Bank Building
Cleveland, Ohio 44114
(216) 696-3232

WHEN AN EXTENSION IS GRANTED, THE DOCUMENT IS TO BE IN THE CLERK'S OFFICE BY THE DATE GRANTED. THE THREE DAY MAIL POLICY DOES NOT APPLY

FILED

JAN 8 1985

JOHN P. HEHMAN, Clerk

No. 83-3602

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Sylvester Marx,

Plaintiff-Appellant,

v.

CENTRAN CORPORATION, ET AL.,

Defendants-Appellees

ORDER

BEFORE: MARTIN, JONES and CONTIE, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman

John P. Hehman, Clerk

United States Court of Appeals

FOR THE SIXTH CIRCUIT

FILED
JAN 23 1985
JOHN P. HEHMAN, Clerk

NO. 83-3602

SYLVESTER MARX,

Plaintiff-Appellant,

vs.

CENTRAN CORPORATION, ET AL.,

Defendants-Appellees

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, CLERK

John Hehman

6CA-75
JL/62

Office-Supreme Court, U.
FILED
MAY 2 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1572

In the Supreme Court of the United States

October Term, 1984

SYLVESTER MARX, Individually, and as a shareholder of Centran Corporation, on behalf of Centran Corporation and all others similarly situated,
Petitioner,

VS.

CENTRAN CORPORATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT BRIEF OF ALL RESPONDENTS IN OPPOSITION

CRAIG SPANGENBERG
Counsel of Record
1500 National City Bank Building
Cleveland, Ohio 44114
(216) 696-3232
Counsel for Respondents

(Other Counsel on Inside Cover)

BEST AVAILABLE COPY

Of Counsel:

VICTOR DEMARCO
1640 Illuminating Building
Cleveland, Ohio 44113
(216) 696-8920

JOHN J. CHESTER
8 East Broad Street
Columbus, Ohio 43215
(614) 221-4000

RON TONIDANDEL
2000 Huntington Building
Cleveland, Ohio 44115
(216) 696-4700

BEST AVAILABLE COPY

TABLE OF CONTENTS

Introduction 1

Counterstatement of the Case 1

Summary of Argument 4

Argument 6

Reasons for Denying the Writ of Certiorari 6

Reason 1. There Is No Genuine Dispute As to Any Material Fact and No Conflict in the Decisional Law As to Any Issue Arising Under 12 U.S.C. §24 Seventh, §82 or §93(a) 6

A. 12 U.S.C. §24 Seventh 6

B. 12 U.S.C. §82 7

C. 12 U.S.C. §84 9

D. 12 U.S.C. §93(a) 11

Reason 2. There Is No Reason to Grant the Writ to Determine Whether a Private Right of Action Can Be Implied Under 12 U.S.C. §93(b) 12

Reason 3. There Is No Reason to Grant the Writ to Determine Any Issue Under 12 U.S.C. §371c, 12 U.S.C. §375b, 12 U.S.C. §501a or 12 U.S.C. §503 14

Reason 4. There Is No Reason to Grant the Writ to Review Any Issue Respecting Pre-emptive Rights, the MMBI Transaction or Section 1842(d) of the Bank Holding Company Act 14

A. Facts on the issue of pre-emptive rights 14

B. The facts on the MMBI transaction 16

C. 12 U.S.C. §1842(d) 17

Reason 5. The Facts of This Case Present No Genuine Constitutional Issue 18
Reason 6. There Is No Reason for This Court to Review the Trial Court's Discretion in Dismissing Without Prejudice the Pendent State Claim 20

In Answer to Petitioner's Brief

A. Response as to facts 21
B. Response to Petitioner's case law 22
C. Response to Petitioner's Reason No. 4 23

Conclusion 25

TABLE OF AUTHORITIES

Cases

Bank of Bethel v. Paquioque Bank, 81 U.S. 383 (1872) 20
Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974) 8
Cort v. Ash, 422 U.S. 66 (1975) 13, 18
First Nat. Bank v. Dickinson, 396 U.S. 122 (1969) 20
First National Bank v. National Exchange Bank, 92 U.S. 122 (1875) 19
First Nat. Bank v. Walker Bank & Trust Co., 385 U.S. 252 (1966) 20
Gries Sports Enterprises, Inc. v. Modell, 15 Ohio St. 3d 284 (1984) 22
Hirshfield v. Briskin, 447 F.2d 694 (7th Cir., 1971) 23
Jackson Transit Authority v. Amalgamated Transit Union, 457 U.S. 15 (1982) 13
McCulloch v. Maryland, 4 Wheat 316 (1819) 20

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 13
Touche, Ross & Co. v. Reddington, 442 U.S. 560 (1979) 13
Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11 (1979) 13
Udall v. Tallman, 381 U.S. 1 (1965) 9
United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 21
United States v. Schooner Peggy, 1 Cranch 103 8
Universities Research Assoc. v. Coutu, 450 U.S. 754 (1981) 13

Statutes

12 C.F.R. §1.4 ..... 2, 4, 7, 12, 22
12 C.F.R. §7.1130 9
12 C.F.R. §7.1131 9
12 C.F.R. §7.7518 9
12 U.S.C. §24 ..... 1, 6
12 U.S.C. §24 Seventh 6, 7, 11, 19
12 U.S.C. §71 19
12 U.S.C. §71a 19
12 U.S.C. §73 19
12 U.S.C. §82 ..... 1, 6, 7, 8, 9, 11
12 U.S.C. §84 ..... 1, 6, 9, 10, 11
12 U.S.C. §93 ..... 11, 12
12 U.S.C. §93(a) 2, 6, 11
12 U.S.C. §93(b) 2, 4, 12, 13, 18, 25
12 U.S.C. §371c 2, 10, 11, 14
12 U.S.C. §375b 1, 10, 11, 14
12 U.S.C. §501a 2, 14
12 U.S.C. §503 14
12 U.S.C. §1841(a)(2) 16

12 U.S.C. §1842(d) 1, 2, 14, 17, 18
12 U.S.C. §1846 2
12 U.S.C. §1847 2
12 U.S.C. §1847(a) 18
12 U.S.C. §1847(b) 18
12 U.S.C. §1849 2
15 U.S.C. §77q 2, 15
15 U.S.C. §78j 2, 15
Garn-St. Germain Depository Institutions Act of 1982 (Pub. L. No. 97-320, Title IV, §402, 96 Stat. 1510 (Oct. 15, 1982)) 8

Rules

Comptroller's Manual for National Banks (1965), ¶1130 and ¶1131 9

INTRODUCTION

Central National Bank of Cleveland ("CNB" herein) is a national banking association directly chartered by the United States, rechartered with broader powers in 1971. Centran Corporation ("Centran" herein) is the present name of a Delaware corporation chartered in 1970. It is a duly registered bank holding company. All of the investment activities at issue were conducted exclusively by CNB and supervised, managed and controlled by its Board of Directors. Both Centran and CNB are nominal defendants, in that plaintiff brought his derivative action on behalf of and for the benefit of both CNB and Centran.

Sylvester Marx ("Marx" herein), Plaintiff and Petitioner, bought 200 shares of Centran's 4,000,000 common shares in the open market in 1978. He was never a shareholder in CNB. He maintained his stock ownership until October 29, 1984, when he transferred ownership to a Trustee. He died soon after the affirmance by the Court of Appeals.

The individual defendants against whom damage recovery was sought constitute most of the directors and some of the officers of both Centran and CNB. All the original defendants remain Respondents herein. All the Respondents submit this joint Brief in Opposition.

COUNTERSTATEMENT OF THE CASE

The original case was filed on multiple theories, and new theories of statutory violation were added in early briefs on various motions. Petitioner's First Amended Complaint alleged violations of 12 U.S.C. §§24, 82, 84, 375b and 1842(d), and violation of the Comptroller's regu-

lation 12 C.F.R. §1.4. A right of action was claimed under 12 U.S.C. §§93(a), 93(b), 1847 and 1849. The stock sale transaction with Marine Midland Bank, Inc. ("MMBI" herein) was pleaded as a violation both of 12 U.S.C. §1842 (d) and the pre-emptive rights of Centran shareholders. In later briefing plaintiff Marx gave notice of intention to amend to include violations of securities law, 15 U.S.C. §§77q and 78j, and a violation of 12 U.S.C. §371c. In the Court of Appeals plaintiff invoked a cause of action under 12 U.S.C. §1846, and added 12 U.S.C. §501a in this Court.

All of the above statutes and regulations are still claimed by Petitioner to support a direct action for Marx and a class action for Centran shareholders under Count I; a derivative action on behalf of and for the benefit of Centran or alternatively CNB under Count II; and a state law action for breach of fiduciary duty under Count III. Every issue under every statute is here presented for review on the petition for writ of certiorari. In addition, Petitioner submits in this Court a new constitutional issue questioning the limits of a national bank's right to borrow money to buy United States bonds.

New issues as to Petitioner's standing to appeal, and as to substitution of a party plaintiff, have arisen since the affirmance by the Court of Appeals on November 8, 1984. Marx, the sole plaintiff, died on November 20, 1984. At death he became no longer the owner of the 200 Centran shares which gave him standing to pursue the derivative claims.

There should be no dispute as to the facts on any issue. As soon as the Amended Complaint was filed, the parties agreed to a massive voluntary discovery in which Centran and CNB produced every document, record, chart, report or memorandum in their files and archives which was

material or relevant to the Incremental Securities Portfolio Program of 1980, or to any of the other issues on lending limits, borrowing limits, the MMBI transaction, pre-emptive rights, and the 1970-1971 mergers. The parties then stipulated the authenticity of all documents and summarized the relevant facts in lengthy Stipulations of Fact which in turn were enlarged as briefing proceeded.

The defendants moved for Summary Judgment in the District Court on all the claims for direct damages to the Centran shareholders in the individual action and class action under Count I. The District Court granted Summary Judgment on this Count. This necessarily ended the derivative action of Count II, since Centran as the shareholder of CNB itself had no private right of action against the CNB directors and officers to support either a derivative or double-derivative case.

The District Court dismissed the state law action pleaded in Count III, but without prejudice to plaintiff's right to refile in state court. The basis for the dismissal was that no federal action remained to which Count III remained pendent.

Plaintiff appealed on all three counts to the Court of Appeals for the Sixth Circuit. Before filing his brief he filed a petition for writ of certiorari in the Supreme Court of the United States, Case No. 83-615, invoking this Court's Rule 18. Certiorari was denied at that time. The appeal was briefed and argued in regular order in the Court of Appeals, which affirmed the District Court order on every point on November 8, 1984. En banc hearing was denied and rehearing was denied on January 8, 1985.

The District Court's Memorandum of Opinion is published in Petitioner's Appendix at pp. A2-24. The Opinion itself contains the text of most of the statutes and

regulations pleaded by plaintiff or suggested in plaintiff's briefs as an alternate ground of recovery. The opinion of the Court of Appeals is published in Petitioner's Appendix at pp. A62-A91. (It is also reported in 747 F.2d 1536.) It likewise covers every statute and regulation cited by plaintiff-appellant, answers all of the multiple theories presented to justify recovery, and presents authorities in addition to those cited in the District Court opinion and the defense briefs. It would be a shameful waste of this Court's time for Respondents to repeat or paraphrase all the content of the excellent opinions just to prove there is no conflict between the decision in this case and any other decision at any federal level. Respondent will simply address the new theories, or new interpretations of the fact stipulations, presented in Petitioner's brief in support of his petition for writ of certiorari.

SUMMARY OF ARGUMENT

The facts presented to the District Court establish beyond dispute that none of the Respondents has violated a single statute pleaded or briefed by Petitioner. The real issue in the case is whether Petitioner has a private right of action for violation of a regulation of the Comptroller of the Currency. The facts establish a genuine dispute whether the bank directors and officers did, or did not, exercise the prudent banking judgment which is required by 12 C.F.R. §1.4 in a bond purchase program.

If the regulation was violated, the statutory plan of 12 U.S.C. §93(b) gives exclusive power to the Comptroller to charge the violation, hold hearings, and impose or remit a civil penalty payable to the Treasury. Congress did not

grant a private right of action to enforce regulations. The test factors for determining Congressional intent on the private right of action issue have been thoroughly elaborated by this Court in a series of decisions. The District Court and Court of Appeals complied with this Court's standards in every respect.

Petitioner raises an issue on violation of pre-emptive rights which is baseless. Centran shareholders had no pre-emptive rights. Ohio's corporate code provisions regarding pre-emptive rights of shareholders in Ohio corporations cannot engraft pre-emptive rights into the stock of Delaware corporations issued under Delaware's corporation code.

Petitioner claims a constitutional issue arising under the Fifth Amendment. The theory presented is that a shareholder's derivative lawsuit is a personal property right which cannot be converted to public use without compensation and without due process of law. That is irrational. National banks are instruments of national government, subject to the paramount authority of Congress.

Petitioner has raised an issue of standing, since the individual plaintiff died over four months before the petition for writ of certiorari was filed. No motion for substitution is pending in this Court. Counsel for Petitioner demands, as a condition precedent to substitution, that the Court of Appeals or this Court must hold a trial in equity to rescind a stock transfer and order the original Marx shares to be administered in his probate estate. The issue should be ignored. It has not been properly presented and there is no record upon which an appellate decision can be based.

ARGUMENT

REASONS FOR DENYING THE WRIT OF CERTIORARI

Reason 1. There Is No Genuine Dispute As to Any Material Fact and No Conflict in the Decisional Law As to Any Issue Arising Under 12 U.S.C. §24 Seventh, §82, §84 or §93(a).

A. 12 U.S.C. §24 Seventh

Chapter 2 of Title 12 is designated the National Bank Act. It comprises §§21 through 215b. Section 24 deals with the corporate powers of national banks. The subsection, §24 Seventh, is the grant of incidental powers "necessary to carry on the business of banking." With respect to dealing in securities, banks, in general, can only buy and sell for their customers' accounts, but "the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe."

There is a special provision in §24 Seventh with respect to government bonds, which provides:

> "The *limitations and restrictions* herein contained as to dealing in underwriting, or purchasing for its own account, investment securities *shall not apply* to obligations of the United States, or general obligations of any State or of any political subdivision thereof. * * *" (Emphasis added)

The Comptroller designates obligations of the United States and general obligations of any State or its political subdivisions as "Type I" securities. The parties stipulated that:

> "The Court may * * * treat the Securities Portfolio increase in Municipal Bond holdings as though all purchases with short term borrowings were purchases of Type I securities."

CNB could not violate §24 Seventh regardless of the amount of such securities it bought for its own Portfolio account in 1980. There is a regulation of the Comptroller, 12 C.F.R. §1.4, sometimes called the Rule of Prudence, wherein the Comptroller allows unlimited dealing in Type I securities "subject only to the exercise of prudent banking judgment." That regulation will be separately discussed. There is no doubt that the regulation is part of the federal law which controls national banks, but there is likewise no doubt that the regulation is not itself a "provision" of the statute. The Respondents did not violate 12 U.S.C. §24 Seventh.

B. 12 U.S.C. §82

Section 82 was a provision of Chapter 2 which limited the total outstanding indebtedness for which a national bank could be liable at any time. It was often called the "borrowing limit." In general, the borrowing limit could not exceed the bank's unimpaired paid-in capital stock plus 50% of its unimpaired surplus. (The text printed in Petitioner's Appendix is incomplete, omitting the clause as to surplus.) The parties stipulated balance sheets and quarterly reports showing that CNB's borrowing limit under §82 ranged from about $71 million on December 31, 1979 to about $76 million on December 31, 1980. That limit was far less than the $307 million in bond purchases in 1980.

The parties stipulated that the money used to purchase the added securities all came from two sources, Federal

Funds Purchased (called "Fed Funds") and Sale and Repurchase Agreements (called "Repos"). The issue presented to the trial court at the time the original Complaint was filed was whether Fed Funds and Repos were to be treated as contracts of purchase and resale (the Fed Fund transaction), as contracts of sale and repurchase (the Repo transaction), or whether both types of transactions were to be treated as borrowing and indebtedness subject to the limitation of 12 U.S.C. §82.

Seven days after the Complaint was filed, 12 U.S.C. §82 was repealed in its entirety by the Garn-St. Germain Depository Institutions Act of 1982. (Pub. L. No. 97-320, Title IV, §402, 96 Stat. 1510 (Oct. 15, 1982)). The District Court applied the rule that the law in effect at the time of decision is the law of the case. The Court of Appeals affirmed. This rule has been the law of the United States since 1801 when Chief Justice Marshall stated the principle in *United States v. Schooner Peggy*, 1 Cranch 103, 110. In *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711 (1974), the Supreme Court restated the proposition saying that:

> "A court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."

Both lower courts agreed that the exception did not apply because there was no injustice in recognizing the repeal of a statute which the defendants had not violated in the first place. Both Federal Reserve regulations and the Comptroller's regulations interpreted the effect to be given Fed Fund and Repo transactions. All the CNB transactions in 1980 were in complete harmony with those regulations and in accord with the "Comptroller's Manual for National Banks."

Up until 1965 the Comptroller instructed national banks to include Fed Funds and Repos within the borrowing and lending limits. The Comptroller reversed this ruling and published his new rules in the 1965 Manual as ¶1130 and ¶1131. These were first published in the Federal Register in 1971, as 12 C.F.R. §7.1130 and §7.1131. They remain unchanged. Both of them are referred to in a later expanded rule, 12 C.F.R. §7.7518, which provides:

> "For purposes of 12 U.S.C. 82, a national bank's indebtedness or liability does not include Federal Funds Purchased (see §7.1130), obligations to repurchase securities sold (see §7.1131), or bills payable to the Federal Reserve (12 U.S.C. 82(5)). * * *."

There is no reason for this Court to review again the principle it announced in *Udall v. Tallman,* 381 U.S. 1, 16 (1965) that "when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." The Respondents did not "knowingly violate" 12 U.S.C. §82.

C. 12 U.S.C. §84

This code provision is commonly known as the "lending limit." It provides in general that a national bank cannot lend to any one person or entity at amount which would make the particular borrower's total obligation to the bank exceed 10% of the bank's combined unimpaired capital and surplus. In the case of CNB in 1980, the 10% lending limit averaged about $14 million, based on stipulated balance sheets.

Petitioner's theory is that the Incremental Securities Portfolio Program of CNB in 1980 would have benefited Centran if CNB had made its expected profit. Centran

had the power to issue Repos and the power to buy bonds for its own account, but never did so. Centran was not a member bank of the Federal Reserve system and had no power to purchase Fed Funds. CNB did use Fed Funds to buy part of the portfolio. The whole bond program, it is argued, was for the benefit of Centran and was, therefore, "in effect and in substance" a loan from CNB to Centran when CNB did what Centran could not do.

The parties stipulated:

> "During 1980 CNB did not in fact make any loans to Centran, and did not in fact transfer to Centran any monies except for dividend payments on its common stock. * * *
>
> "Although plaintiff concedes there was not in fact any loan from CNB to Centran which might violate 12 U.S.C. 84 or 12 U.S.C. 376b, plaintiff maintains its contention that the securities purchased by CNB were 'in effect or in substance' loans from CNB to Centran."

The District Court's opinion dismisses the notion that an imaginary loan can constitute an actual violation of Section 84 with the adjective "inconceivable." The Court of Appeals agreed that Petitioner's theory was inconceivable and added that "Marx has not advanced, nor can we discover, any coherent argument for treating these transactions as loans to Centran."

It can be added here that the "loan" theory is not confined to 12 U.S.C. §84. In the lower courts the plaintiff argued that the hypothetical loans were loans to "insiders" in violation of the 1978 amendment to the Federal Reserve Act, 12 U.S.C. §375b. Petitioner made an additional claim that since CNB and Centran were affiliated, CNB also violated the terms of 12 U.S.C. §371c, which regulates

loans from a member bank of the Federal Reserve to an affiliate. There is little point in discussing the specific provisions of Sections 375b and 371c when no actual loan was ever made.

D. 12 U.S.C. §93(a)

Section 93(a) is the recodification in 1978 of the original §93 of the National Banking Act, first enacted in 1864. It deals entirely with "knowing violations" of those sections of the Act which are "provisions of this chapter," meaning original Chapter 2. It applies only to directors of national banks, and accordingly cannot apply to those few Respondents who were only officers of CNB. There is no dispute that §93(a) makes directors liable in their personal and individual capacity "for all damages which the association, its shareholders, or any other person, shall have sustained."

This section gives CNB, the association, a direct action against its own directors. It gives Centran, as sole "shareholder," a direct action against the CNB directors. It does not specifically grant a direct cause of action to the shareholders of the holding company.

This raised the question whether Marx was included in the category of "any other person" who would have a direct action under §93(a). The trial court treated Marx as though he were a shareholder of a national bank, but found there had been no violation of any Chapter 2 provision of the statutes. The Court of Appeals affirmed on this point, and if certiorari were granted, this Court would surely affirm that the facts disclose no violation of 12 U.S.C. §24 Seventh, nor 12 U.S.C. §82, nor 12 U.S.C. §84. This ends the possibility of a direct action, whether individual, class, or derivative, under the private enforcement rights granted in §93(a).

Reason 2. There Is No Reason to Grant the Writ to Determine Whether a Private Right of Action Can Be Implied Under 12 U.S.C. §93(b).

The new subsection 93(b) was added to 12 U.S.C. §93 in a 1978 amendment to the National Bank Act. It created a comprehensive eight-part procedure whereby the Comptroller could impose a civil penalty of $1,000 a day for any violation of "any of the provisions of this title * * * or any regulation issued pursuant thereto." The penalty could be imposed against the association itself, or any officer, director, employee, agent or other person participating in the conduct of the association's affairs. The Comptroller alone could determine the amount of the penalty, taking into account the size of resources and the good faith of the person charged, the gravity of violation, and history of previous violations, and "such other matters as justice may require."

The Comptroller, in his sole discretion, may "compromise, modify or remit any civil money penalty which is subject to imposition or has been imposed under this section." All civil penalties collected must go, not to the persons damaged, but "into the Treasury of the United States." There is not a single sentence in all the eight subparagraphs of §93(b) which even hints at any private right of action or private enforcement.

The text of 12 C.F.R. §1.4 permits a national bank to purchase Type I securities for its own account "subject only to the exercise of prudent banking judgment." It defines the adjective "prudent," as the Comptroller meant it, by stating: "Prudence will require such determinations as are appropriate for the type of transaction involved." Respondents concede, for the purpose of this lawsu... and

its appeals, that the Comptroller could have determined that it was not prudent banking judgment for CNB to create such a large addition of long maturity bonds in 1980 supported by such short term liabilities as Fed Funds and Repos. There is not much risk when the assets and the liabilities mature at the same time and the return on the assets will pay off all the liabilities. There is risk when there is a gap, in either direction, between the maturities of the assets and the supporting liabilities.

Assuming, as this Court will surely assume, that the Comptroller could have made charges, held hearings, and might have imposed civil penalties against the individual Respondents, it does not follow that a private Centran shareholder can imply a private enforcement right for damages payable to himself, or to the class of Centran shareholders, or to Centran or CNB in a derivative action. The Courts below have held that the Comptroller has the exclusive power to enforce 12 U.S.C. §93(b), in complete accord with all the recent Supreme Court decisions on private rights of action. This Court has no reason to re-examine the private right of action issue in light of its decision in *Cort v. Ash*, 422 U.S. 66, 78 (1975) and the elaboration and refinement of the *Cort v. Ash* factors in the following cases, among others: *Touche, Ross & Co. v. Reddington*, 442 U.S. 560, 568 (1979); *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979); *Universities Research Assoc. v. Coutu*, 450 U.S. 754, 770 (1981); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981); and *Jackson Transit Authority v. Amalgamated Transit Union*, 457 U.S. 15, 21 (1982).

The Respondents cannot be held liable to the Petitioner under 12 U.S.C. §93(b).

Reason 3. There Is No Reason to Grant the Writ to Determine Any Issue Under 12 U.S.C. §371c, 12 U.S.C. §375b, 12 U.S.C. §501a or 12 U.S.C. §503.

12 U.S.C. §371c is published at A53 in Petitioner's Appendix. It deals with the limitations and restrictions on loans and certain other covered transactions between affiliates. CNB and Centran were affiliates. The nonsense claim that CNB's bond purchases were "in effect" loans to Centran has already been analyzed.

12 U.S.C. §375b prohibits loans among or for the benefit of "insiders" and "control" persons. It cannot be violated when there is no loan at all. Petitioner refers to this section only in passing, saying that both Courts below held that a "constructive loan could not be inferred" between the bank and its holding company. (Brief at 23.) That decision is correct.

Petitioner's Appendix publishes the text of 12 U.S.C. §501a and §503. These are enforcement sections included within the Federal Reserve Act, which might apply if §§371c and 375b of the Federal Reserve Act had been violated by a real loan among "insiders" or affiliates. Neither §501a or §503 could possibly apply to a violation of the Rule of Prudence or any other regulation of the Comptroller.

Reason 4. There Is No Reason to Grant the Writ to Review Any Issue Respecting Pre-emptive Rights, the MMBI Transaction or Section 1842(d) of the Bank Holding Company Act.

A. Facts on the issue of pre-emptive rights.

Centran was incorporated in Delaware in 1970 with a charter, by-laws, and common shares which did not give

any pre-emptive rights to any Centran shareholder. It did no business until its merger with Central National Bank of Cleveland in 1971. The Articles of Association of the bank, CNB, provided that no shareholder of the capital stock of the Association "shall have any pre-emptive or preferential right." In the 1971 merger, each shareholder in CNB surrendered his shares in the Association for an equivalent number of shares of Centran common. The bank shareholders, with no prior pre-emptive rights, became holding company shareholders, with no future pre-emptive rights. Dissenters were paid fair value.

Centran acquired 97% of the stock of American Bank of Commerce in Akron, Ohio by direct purchase in 1972. Centran raised the purchase money by a public issue of additional common stock. This required a Prospectus, registered with the S.E.C. in 1972. The Prospectus stated: "There are no * * * pre-emptive rights with respect to Centran's Common Stock."

Centran stock was regularly traded in the stock market. Marx bought 200 shares in a market trade in 1978. It is not known which his particular shares came from an original CNB shareholder who acquired his Centran stock in the 1971 merger, or came from a purchaser of the additional issue in 1972. In either case, the seller was a shareholder who must have known there were no pre-emptive rights.

Petitioner claims a securities fraud in that the Centran directors did not give special notice to the merging CNB shareholders that they had no pre-emptive rights before or after the merger. If this violated 15 U.S.C. 77q and 78j in 1971, limitations barred any action after four years. There is no claim of nondisclosure with respect to the new issue of stock sold in 1972.

Petitioner seems to claim that Centran should have notified Marx that his shares would have no pre-emptive rights before his purchase in 1978, but Petitioner fails to suggest any duty on anyone to anticipate that Marx would become a market trader. It is apparent that Marx never purchased pre-emptive rights, never purchased a cause of action for nondisclosure of pre-emptive rights, and never exercised any diligence in 1978 to determine whether pre-emptive rights came with the stock.

Although Petitioner claims that the 1971 merger was a "contract" between Centran and its 1971 shareholders which was not "breached" until 1982, Petitioner makes no coherent argument as to how any contract with Marx existed to be breached.

B. The facts on the MMBI transaction.

In the 1982 recapitalization Centran raised $70 million in equity money by selling a new issue of nonvoting preferred stock to MMBI. Centran then infused $55 million into CNB by buying a new issue of CNB preferred. In the absence of pre-emptive rights the new preferred stock issues were completely within the powers of the respective boards of directors and required no stockholder approval or Federal Reserve Board approval.

MMBI was itself a Delaware bank holding company with all of its banking subsidiaries located in the State of New York. Under Ohio law at the time MMBI could acquire no controlling interest in CNB. That is still the law of Ohio, and MMBI still has no controlling interest in CNB or in Centran. MMBI would be deemed to have "control" over Centran or CNB only if MMBI directly or indirectly owned, controlled, or had power to vote 25% or more of any class of *voting securities* or to control the election of a majority of the directors of Centran or CNB (12 U.S.C. §1841(a)(2), Definitions).

Petitioner invents "control" by representing to this Court that the nonvoting preferred stock issued to MMBI carried warrants allowing conversion into Centran voting common stock, and that such warrants were "exercisable in January 1985." The representation is false. The warrants were highly conditioned, and are not presently exercisable at all. They cannot be exercised, by their terms, until interstate banking becomes legal. Ohio law still prohibits a foreign holding company from acquiring a more than 5% voting interest in another bank holding company doing business in Ohio with its banking subsidiaries in Ohio. Federal law still permits Ohio to maintain its exclusionary law.

C. 12 U.S.C. §1842(d).

Petitioner claims a right of action for violation of 12 U.S.C. §1842(d), which is a provision of the Bank Holding Company Act. Section 1842(d) prohibits a holding company such as MMBI from acquiring, "directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional *bank*" located out of state. CNB is such a bank. Centran is not a bank. MMBI acquired no interest in CNB. Section 1842(d) itself allows MMBI to acquire such an interest by acquiring *voting* shares of Centran whenever such acquisition is specifically authorized by Ohio law. Since Ohio law has not yet changed, MMBI still cannot acquire more than 5% of the voting shares, and cannot violate §1842(d).

The District Court held that §1842(d) was not violated. The Court of Appeals did not reach that question, holding instead that even if §1842(d) were violated, plaintiff Marx would have no private right of action. The trial court had reached the same conclusion, as an alternative theory justifying dismissal, and was affirmed on that point.

This Court would necessarily affirm, if the writ were granted. The exclusive federal remedy for violation of §1842(d) is contained in the criminal penalty provisions of §1847(a), or the civil penalty procedure of §1847(b) which can be administered only by the Federal Reserve Board. The lower court opinions properly equate §1847(a) and (b) with 12 U.S.C. §93(b) with respect to all the Supreme Court decisions following the rule of *Cort v. Ash, supra.*

Reason 5. The Facts of This Case Present No Genuine Constitutional Issue.

It is risky to try and paraphrase a Petitioner's point when the Respondents do not fully understand what the Petitioner is trying to say. As Respondents read it, Petitioner is claiming a violation of the Fifth Amendment in that the "shareholders' private property has been taken for public use, without just compensation, and without due process of law, prohibited by Amendment 5 of the United States Constitution." (Brief, at 26.)

The premise of the argument is that shareholders have a contractual right "to control their corporation." Part of the contract is the director's implied agreement to be prudent. Unless the shareholders have a private right of action to collect damages from the directors for imprudent bond purchases the shareholders' right of control "has been converted to public use."

The basic fallacy is that shareholders do not have the right to control the corporation's business affairs. They elect directors, who are the executive representatives of the corporation. They derive their powers from the corporate code and the corporate charter. The stockholders neither confer, revoke, nor interpret those powers.

This is certainly the plan of the National Bank Act, which provides that "the affairs of each association shall be managed by not less than five [nor more than twenty-five] directors who shall be elected by the shareholders * * *." 12 U.S.C. §§71, 71a. "Each director must take oath that he will diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated any of the provisions of this title * * *." 12 U.S.C. §73.

There is no oath that the director can never make an error of business judgment. It follows that directors can buy as many U.S. bonds as Congress has authorized in 12 U.S.C. §24 Seventh, subject to supervisory control by the Comptroller of the Currency. Congress has not given shareholders a private right of action to enforce the Comptroller's regulations. Petitioner has no "private property" rights in the national banking system regulatory plan, and has lost nothing which requires compensation.

Petitioner cites *First National Bank v. National Exchange Bank*, 92 U.S. 122 at 127 (1875), which does say that the incidental powers of a bank are intended to allow it to "conduct its affairs * * * safely and prudently." It also says that banks may incur liabilities and obligations, and that "obligations may be assumed that result unfortunately." (92 U.S. at 127.) The opinion nowhere says that all borrowing must be "safe, prudent and temporary," as Petitioner claims. (Brief, p. 18.)

It is preposterous to claim that the Federal Courts can review every national banking system statute enacted by Congress and every regulation promulgated by the Comptroller to determine whether they meet a Supreme Court superior standard of "safety and prudence." On the other hand, the Federal Courts do not hesitate to intervene when

the Comptroller or the Board *exceeds* the regulatory power delegated by Congress. Such cases do not indicate that the Supreme Court has an ultimate regulatory power. On the contrary, those cases necessarily recognize that the Constitution vests all legislative powers in the Congress of the United States.

In summary, all of the constitutional issues raised by Petitioner were settled more than a century ago when the Supreme Court held that national banks are created by Congress, and are instruments of national government. *Bank of Bethel v. Paquioque Bank*, 81 U.S. 383 (1872). The power of Congress over national banks is paramount. *McCulloch v. Maryland*, 4 Wheat 316 (1819); *First Nat. Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 256 (1966). Congress has absolute authority over national banks. *First Nat. Bank v. Dickinson*, 396 U.S. 122, 131 (1969).

There is no reason for this Court to grant the writ to review the power of Congress to limit private shareholder's derivative lawsuits.

Reason 6. There Is No Reason for This Court to Review the Trial Court's Discretion in Dismissing Without Prejudice the Pendent State Claim.

If Petitioner really has a state court cause of action, he could have filed in the state court in Ohio at any time after January 1, 1981. The District Court's order did not diminish that right. It must be emphasized that the dismissal occurred early in the Federal Court proceedings, after the Amended Complaint, before Answer, following intensive voluntary discovery which used little court time or court resources. There is no judicial economy in compelling the District Court to take the state court case through full trial after all the federal issues have been

dismissed. The leading case remains *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), where this Court suggested that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state court claims should be dismissed as well." (383 U.S. at 726.)

IN ANSWER TO PETITIONER'S BRIEF

A. Response as to facts.

In view of all the stipulations, Petitioner is not entitled to such gaudy distortions as his claim that the directors "bet the bank" (p. 18, 56); bought bonds "on margin" (p. 28); or bought bonds with $307 million in borrowed funds "rolled over daily for 3 years" (pp. 7, 18, 21). The bank was never in danger of insolvency or failure. The 1980 year began with a surplus of about $128 million and ended with a larger surplus. Every bond was purchased outright with payment in full. There were no short or long sales or purchases. The purchase program lasted only one year. CNB began with an established portfolio of more than $560 million in United States and State obligations. The incremental purchasing program in 1980 increased the total to $867 million. Liquidation began in January, 1981 and sold off $195 million, nearly two-thirds of the $307 million incremental addition by the end of 1981.

The bond program was only one of many business programs in a bank that had over $1.7 billion in demand and time deposits and NOW accounts. Petitioner's claim that it is "speculative" to buy bonds in excess of capital and surplus (p. 28) makes no accounting sense. If a

bank with $1 million in surplus bought $10 million in bonds (assets) with $10 million in borrowed funds (liabilities), the assets would offset the liabilities and the bank would still have $1 million in surplus. The bank could put all of its depositors funds in U.S. bonds, except for Reserve requirements.

The essence of Petitioner's claim is that the creation of a negative gap between long-term maturing assets and short-term liabilities created the risk that short-term interest might exceed the long-term interest rates of the assets. That risk might make the investment program imprudent, in violation of the Rule of Prudence, 12 C.F.R. §1.4. Petitioner's dilemma is that if the bond purchases were not "prudent," the Comptroller has the exclusive enforcement power to impose a civil penalty. If, on the other hand, the program was "prudent," there would be no violation of 12 C.F.R. §1.4. At the same time, state law would provide no cause of action for "prudent" losses.

B. Response to Petitioner's case law.

Petitioner argues that *Gries Sports Enterprises, Inc. v. Modell,* 15 Ohio St. 3d 284 (1984), establishes a new principle—that Ohio corporate law "controls the internal affairs of Centran" (p. 35) rather than Delaware corporation law. The decision held only that Ohio's conflict of law rules would apply in a breach of contract suit over a contract between two Ohio shareholders. Under the facts of the case, Ohio law was held to control the contracting parties' voting trust agreement. The opinion does not suggest that Ohio shareholders in all foreign corporations have any management control powers under Ohio's corporation code.

C. Response to Petitioner's Reason No. 4.

Petitioner's fourth reason for granting the writ is a claim of conflict between decisions in the Sixth and Seventh Circuit on the issues of standing and devolution by operation of law. There is no record before this Court to support the claim of conflict. There is no motion pending in this Court to substitute Donald Marx, Executor, as party plaintiff. There is no motion in this Court to abate or dismiss the derivative counts in Petitioner's action.

Petitioner relies on *Hirshfield v. Briskin,* 447 F.2d 694 (7th Cir., 1971). There the plaintiff widow renounced her decedent's will and testamentary trust and elected to take by statute. Her stock ownership arose from the settlement of the lawsuit disputing her right to take by statute. It was held that such ownership approximated acquisition by inheritance which would be devolution by operation of law.

In the instant case there is no dispute over the basic fact that Sylvester Marx conveyed his entire securities portfolio to the trustee of his inter vivos trust before his death. The portfolio consisted of 64 certificates representing 5,614 shares of stock in 23 corporations, including 1 certificate for 200 shares of Centran. Marx made the transfer deliberately and intentionally, at the urging of his son Donald, who assisted him in making the transfer.

Petitioner's counsel waited three months after Marx's death to file a formal suggestion of death, and then moved the Court of Appeals *not* to appoint the Executor as substitute party plaintiff until that court had first ruled on a collateral attack on the state probate proceedings and the trust funding transaction. A bitter dispute arose between appellant and appellees over the facts of the trust

and the funding transaction, shown in affidavits, counter-affidavits, and a recanting affidavit.

Meanwhile, the Court of Appeals had affirmed the summary judgment below and had denied rehearing. There was no case left to dismiss. The tenuous retained jurisdiction of the appellate court to rule on the collateral attack depended upon a stay of mandate. The stay expired and the within petition for writ of certiorari was filed before the Court of Appeals could sort out the facts, much less rule on the law. Petitioner's Reason 4 urges this Court to take over the collateral attack left unresolved below and order Respondent Centran to reissue Marx's original stock certificate for delivery to the Executor of his estate. This remains his condition precedent to any consideration of the substitution question.

Respondents suggest that before a reviewing court is requested to rule on such an issue, responsible counsel have a duty to agree upon an honest presentation of the facts. Petitioner's counsel here persists in representing Marx's trust as an "insurance trust" (p. 50, 53) and claims its terms "precluded on its face the acceptance of stock as part of the trust" (p. 53). The claim is disgraceful. The trust agreement, stipulated, says in Article I that it consists of the property listed in the attached schedule. The schedule lists the whole corpus as "Cash in the amount of $10.00." The trust agreement in Article VI reserved the right to add property to the trust estate at any time. Article I also allowed Marx to deposit insurance policies, payable to the trustee. The last "Brief to Clarify" and correcting affidavit of Donald Marx below concedes there is no evidence Marx still owned a single insurance policy at the time he created the trust in 1980. It is established now that he never deposited insurance

policies in the trust, never withdrew policies from the trust, and never bought stock from the cash value of any insurance policy.

The issue of standing relates only to the derivative claims. The Marx Estate would retain rights to direct action claims for his own individual damages. Resolution of the standing issue can wait until this case is remanded to a trial court, if that ever happens. A trial court will have the facilities to resolve the factual dispute in short order. If, on the other hand, this Court denies the petition for writ of certiorari on its merits, or lack of merit, the entire case will end. Respondents are convinced that the writ ought to be denied on the pure ground that there is no error in the decisions below and no conflict with this Court's controlling decisions as to private right of action. Accordingly, Respondents will not at this time suggest the death of plaintiff Marx nor move for substitution. Sylvester Marx petitioned for the writ, and it can be granted or denied in his name.

CONCLUSION

There are neither special nor important reasons to review this case. Every question of federal law involved has been decided in full accord with applicable decisions of this Court. Although this Court has not directly settled the question whether 12 U.S.C. §93(b) gives a private right of action, this Court has repeatedly held that the intent of Congress controls that issue. The decisions of the trial court and Appellate Court case were based squarely on the test factors promulgated by this Court

for determining Congressional intent. The petition for writ of certiorari should be denied.

Respectfully submitted,

CRAIG SPANGENBERG
Counsel of Record
1500 National City Bank Building
Cleveland, Ohio 44114
(216) 696-3232

VICTOR DEMARCO
1640 Illuminating Building
Cleveland, Ohio 44113
(216) 696-8920

JOHN J. CHESTER
8 East Broad Street
Columbus, Ohio 43215
(614) 221-4000

RON TONIDANDEL
2000 Huntington Building
Cleveland, Ohio 44115
(216) 696-4700
Counsel for All Respondents

Office-Supreme Court, U.S.
FILED
MAY 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84- 1572

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SYLVESTER MARX, Individually, and as shareholder of Centran Corporation, on behalf of Centran Corporation and all others similarly situated,
Petitioner,

vs.

CENTRAN CORPORATION, et al.,
Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI To the U.S. Court of Appeals For the Sixth Circuit

---

Donald Weisberger, Counsel of Record
Suite 1425 - 75 Public Square Bldg.
Cleveland, Ohio 44113
(216) 621-7113

Counsel for Petitioner

20pp

TABLE OF CONTENTS

The Comptroller of the Currency cannot by regulation lawfully expand the incidental powers necessary to carry on the business of banking and legitimatize an ultra vires act of borrowing on long term government bonds purchased substantially in excess of a national bank's capital & surplus, where the bank's purpose is to take a speculative position in the bond market.....1

12 U.S.C. 1842(d) is a viable federal question since under the financial institutions' Supervisory Act of 1966, 12 U.S.C. 1818(B), The Federal Reserve Board Of Governors is empowered to initiate cease and desist proceedings if it has reasonable cause to believe that Centran's transactions with Marine Midland Bank actually violated state law of Ohio.....5

Ohio corporate law controls the internal affairs of Centran.....8

The Sixth Circuit opinion rendered subsequent to the filing of the Petition for Writ of Certiorari and Respondents Brief is in appendix.....9

Directors would never give up control of their corporation by issuing warrants for 37 percent of their common stock for 70 million dollars unless they were in serious trouble.....9

The Armstrong case.....9

Appendix:

Sixth Circuit Opinion, Dated
April 30, 1985.....12,13,14

12 U.S.C. § 1818(b)(1).....15,16

TABLE OF AUTHORITIES

Armstrong v. Chemical Nat. Bank of City of New York, 83 Fed. Rptr. 556..9

CBS v. FCC, 453 U.S. 367, 390.....3

Huston v. Board of Governors of Federal Reserve System, (C.A. 8), No. 84-1084, March 26, 1985.....6

Mansfield Hardwood Lumber Co. v. Johnson, 268 F 2d 317, 321 (5th Cir. 1959), cert. denied 361 U. S. 885.....9

McCutcheon v. Merz Capsule Co., 71 Fed. Rptr. 787 (6th Cir.).....8

STATUTES

12 C.F.R. § 7.1130 and § 7.1131... 2

12 U.S.C. § 24 Seventh.....2

12 U.S.C. § 82.....3

12 U.S.C. § 1818(b).....7

12 U.S.C. § 1842(d).....5,6

No. 84- 1572

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SYLVESTER MARX, Individually, and as shareholder of Centran Corporation, on behalf of Centran Corporation and all others similarly situated,
Petitioner,

vs.

CENTRAN CORPORATION, et al.,
Respondents.

REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
To the U.S. Court of Appeals
For the Sixth Circuit

THE COMPTROLLER OF THE CURRENCY CANNOT BY REGULATION LAWFULLY EXPAND THE INCIDENTAL POWERS NECESSARY TO CARRY ON THE BUSINESS OF BANKING AND LEGITIMATIZE AN ULTRA VIRES ACT OF BORROWING ON LONG TERM GOVERNMENT BONDS PURCHASED SUBSTANTIALLY IN EXCESS OF A NATIONAL BANK´S CAPITAL & SURPLUS, WHERE THE BANK´S PURPOSE IS TO TAKE A SPECULATIVE POSITION IN THE BOND MARKET.

The limit of the authority of a

national bank to borrow to support its purchase of government bonds cannot be expanded by the Comptroller of the Currency beyond the power granted to national banks under 12 U.S.C. 24 Seventh, which grants all such incidental powers as shall be necessary to carry on the business of banking. The limit of borrowing authority cannot be a matter of fashion or whimsey regardless of whether the Comptroller changes his mind as to whether a Repo is construed by him as a borrowing or a purchase.

As pointed out in the Sixth Circuit opinion, at footnote 4 on page A71, the Comptroller currently treats Repos as borrowings as he did prior to 1965 before he enacted 12 C.F.R. 7.1130 and 7.1131, which remain unchanged unless they have been repealed by implication by his latest regulation. These reversals by the Comptroller as to how to treat borrowings is compelling evidence that the agency's

regulation is erroneous and arbitrary. Even the Sixth Circuit is unclear as to the application of the Comptroller's lastest regulation. This purposeful act by the Comptroller is to muddy the water so that national banks can have an arguable basis as in the case at bar to speculate in government bonds.

Additionally, 12 U.S.C. 82, did not delegate the Comptroller any authority to enact these regulations in the first instance. The foregoing are compelling reasons that the Comptroller is wrong and is perpetuating speculation in government bonds. Since the regulations are clearly unsupported by statute, judicial deference to them is inappropriate. See CBS v. FCC, 453 U.S. 367, 390.

It is reassuring to note, as stated on page 8 of Respondent's Brief in Opposition, that, "All the CNB transactions in 1980 were in complete harmony with those

regulations and in accord with the 'Comptroller's Manual for National Banks'", especially when the Comptroller's Manual is not part of the record. It must be supposed that if CNB was in compliance with the Comptroller's Manual in 1981 and 1982, the Respondents would have mentioned it.

The Court must, therefore, conclude that this is a tacit admission by Respondents that the use of short-term repurchase agreements and over-night funds, rolled over on a daily basis for three years, is not an authorized transaction to support CNB's purchase, for its own account, of $307 million of long-term United States, state and municipal bonds.

The real issue of great public importance remains unchanged. The question is: At what point may a national bank disregard its capital and surplus and take a long-term position in United States bonds, using the bonds themselves as the mode of

payment for their own purchase by borrowing thereon and paying interest? It is obvious that if this operation is permitted, a national bank can boot-strap itself into a purchasing situation of U.S. Bonds, unlimited in character. The mystery in this case is why CNB stopped at $307 million in its purchase of the bonds.

12 U.S.C. 1842(d) IS A VIABLE FEDERAL QUESTION SINCE UNDER THE FINANCIAL INSTITUTIONS' SUPERVISORY ACT OF 1966, 12 U.S.C. 1818(b), THE FEDERAL RESERVE BOARD OF GOVERNORS IS EMPOWERED TO INITIATE CEASE AND DESIST PROCEEDINGS IF IT HAS REASONABLE CAUSE TO BELIEVE THAT CENTRAN'S TRANSACTION WITH MARINE MIDLAND BANK ACTUALLY VIOLATED STATE LAW OF OHIO.

The parties stipulated that Centran's transaction with Midland Marine Bank, Inc. was not approved by the Federal Reserve Board of Governors. The prohibition of 12 U.S.C. 1842(d) precludes any bank holding company from acquiring direct or indirect ownership of any bank. "Indirect ownership" requires that formal application

for Board approval is necessary thereunder, especially where it violates the state law of Ohio, which did not authorize out-of-state bank holding companies to come into the State.

These issues have recently been discussed in a case entitled, Huston v. Board of Governors of Federal Reserve System, (C.A. 8), No. 84-1084, March 26, 1985 (no other citation currently available). This case explicitly excluded, in footnote 2, the issue of the Financial Institutions' Supervisory Act of 1966, as it affected its holding that the interstate transaction involving Iowa banks did not require the Federal Reserve Board of Governors approval. The issue of 12 U.S.C. 1842(d) remains unresolved in the case at bar as a Federal question since the Sixth Circuit Court of Appeals failed to reach this issue, and because the Federal Reserve Board of Governors approval was not obtained either under 12 U.S.C. 1842(a) & (d) and/or under 12

U.S.C. 1818(b). Under the circumstances of this case Centran directors were required to seek and obtain such approval since there was reasonable cause to believe Centran, a bank holding company, was about to engage in an "unsafe or unsound practice", or was about to violate "law, rule or regulation" of the state of Ohio.

Thus, a federal question exists if Petitoner's contention is correct, that Centran directors illegally entered into a transaction with Marine Midland Bank, Inc., a holding company, in violation of 12 U.S.C. 1842(d), by failing to get the requisite approval from the Federal Reserve Board of Governors, whereby the Petitioner's stock was diluted. Petitioner has presented this issue under "Questions Presented", number 5, in the Petition for a Writ of Certiorari. This is not a matter of Ohio state law only, but involves the question as to whether Petitioner has any rights for violation of

federal law by Respondents, in consummating a transaction without first obtaining the proper federal approval.

Petitioner contends that Centran transaction with Midland Marine Bank which is part of the record falls within the Federal Reserve Board of Governors guidlines set forth in the Huston case, supra. as to voting rights and indirect control.

OHIO CORPORATE LAW CONTROLS THE INTERNAL AFFAIRS OF CENTRAN.

The facts remain, as the parties stipulated, that Centran does not do any business whatsoever in the state of Delaware. The law is clear in the Sixth Circuit that a corporation such as Centran, which has no contact with the state of its incorporation, Delaware, other than the naked fact of incorporation, is not entitled to the benefit of the corporate law of the state of incorporation. See McCutcheon v. Merz

Capsule Co., 71 Fed. Rptr. 787 (6th Cir.). See also Mansfield Hardwood Lumber Co. v Johnson, 268 F 2d 317, 321 (5th Cir. 1959), cert. denied 361 U.S. 885.

THE SIXTH CIRCUIT OPINION RENDERED SUBSEQUENT TO THE FILING OF THE PETITION FOR A WRIT OF CERTIORARI AND RESPONDENTS BRIEF IS IN APPENDIX.

DIRECTORS WOULD NEVER GIVE UP CONTROL OF THEIR CORPORATION BY ISSUING WARRANTS FOR 37 PERCENT OF THEIR COMMON STOCK FOR 70 MILLION DOLLARS UNLESS THEY WERE IN SERIOUS TROUBLE.

ARMSTRONG v. CHEMICAL NATIONAL BANK OF NEW YORK, 83 Fed. Rptr. 556 AT PAGE 566 STATED:

> "The court concedes that among the incidental powers necessary to carry on the banking business, is the power, under certain circumstances temporarily to borrow money....."

Immediately preceding Page 566, the Court stated:

> "A national bank can exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating

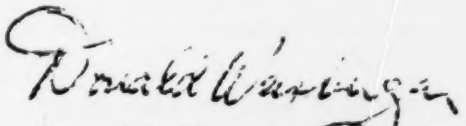
promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security and by obtaining, issuing and circulating notes, The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow money; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court in the case of First Nat. Bank v. National Exch. Bank, 92 U.S. 122, 127, 'authority is thus given in the act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business and to enable a bank to conduct its affairs within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.' Nor do we doubt that a bank, in certain circumstances may become a temporary borrower of money."

Borrowing for three years is not "temporary"!

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Respectfully Submitted,



Donald Weisberger,
Counsel of Record for
Petitioner
Suite 1425
75 Public Square Bldg.
Cleveland, Ohio 44113
(216) 621-7113

APPENDIX

p 12

No. 83-3602

FILED

APR 30 1985

JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SYLVESTER MARX,

Plaintiff-Appellant,

vs.

CENTRAN CORPORATION, et al.,

Defendants-Appellees.

ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

Before: MARTIN, JONES and CONTIE, Circuit Judges.

A series of motions are now before the court, each owing to the death of plaintiff Sylvester Marx. The Appellees move for the substitution of Donald Marx, Executor of the Estate of Sylvester Marx, as party plaintiff. They also move for an order holding the estate liable for all costs charged against Sylvester Marx prior to his death and for all costs which may be charged against the plaintiff in future proceedings. Finally, they move that this court dismiss the derivative claims due to a lack of standing on the part of Marx's executor. The Appellant also moves for substitution of Donald Marx as Executor. In addition, it moves for an order compelling the reissue of the 200 shares of Centran stock in the name of Sylvester Marx and the delivery of the stock certificate to Donald Marx, Executor. Finally, Appellant moves for disallowance of court costs previously allowed to Appellees as a sanction for the perceived bad faith of the Appellees. We

We have previously granted Appellant's motion to stay our mandate until April 4, 1985.

First, as to the substitution of Donald Marx, Executor, both parties have moved for his substitution and substitution is appropriate under Federal Rule of Appellate Procedure 43(a). Accordingly, Donald Marx, Executor of the Estate of Sylvester Marx will be substituted as party plaintiff.

The Appellees' motion as to costs is not properly before us. The appropriate forum for determining whether the estate is liable for costs already incurred is the probate court presiding over the estate. The Appellees must submit their claim for costs like any other creditor of the decedent. The request as to future costs presumes that costs will someday be awarded against the estate and that the estate will for some reason contend that it is not liable. Since federal courts do not render advisory opinions, we decline to grant this motion.1/

The Appellant's motion to compel the reissue of the shares of stock presents a fact-bound question not litigated below and not within the scope of the pleadings. It is in addition a matter of state law. Since the question has not been litigated below, since its resolution depends on facts which we are not equipped to determine and since it is a matter of state law, we believe that it could best be resolved in either the probate court or a separate state court action for declaratory or injunctive relief.

1/ To avoid possible confusion, we note that our denial of these motions does not mean that the estate is not liable for costs. Rather, we decline to address the two related questions.

The Appellees' motion to dismiss need not be decided by this court since we have already affirmed the dismissal of the derivative claims on the merits. Appellees will have an adequate opportunity to make their argument regarding standing in their response to Appellant's petition for certiorari and, if certiorari is granted, in their brief on the merits to the Supreme Court. See Supreme Court Rule 22.1 (brief in opposition to petition for certiorari may present "any matter or ground why the cause should not be reviewed").

Finally, we find no basis for disallowing the costs previously imposed. The Appellant's motion to disallow costs previously granted will therefore be denied.

The motions to substitute Donald Marx, Executor of the Estate of Sylvester Marx, are hereby GRANTED. All other motions are DENIED.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

12 U.S.C. § 1818

(b)(1) If, in the opinion of the appropriate Federal banking agency, any insured bank, bank which has insured deposits, or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such a bank is engaging or has engaged, or the agency has reasonable cause to believe that the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is about to engage, in an unsafe or unsound practice in conducting the business of such bank, or is violating or has violated, or the agency has reasonable cause to believe that the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the bank or any written agreement entered into with the agency, the agency may issue and serve upon the bank or such director, officer, employee, agent, or other person a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the bank or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the bank or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the bank or its directors, officers, employees, agents, and other persons participating in the conduct of the affairs of such bank to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the bank or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(3) This subsection and subsections (c) through (f) and (h) through (n) of th section shall apply to any bank holding company, and to any subsidiary (other than bank) of a bank holding company, as those terms are defined in the Bank Holdi Company Act of 1956 [12 U.S.C.A. 1841 et seq.], and to any organization organiz and operated under section 25(a) of the Federal Reserve Act [12 U.S.C.A. 611 et se or operating under section 25 of the Federal Reserve Act [12 U.S.C.A. 601 et seq.], the same manner as they apply to a State member insured bank. Nothing in th subsection or in subsection (c) of this section shall authorize any Federal bankin agency, other than the Board of Governors of the Federal Reserve System, to issue notice of charges or cease and desist order against a bank holding company or a subsidiary thereof (other than a bank or subsidiary of that bank).

(4) This subsection and subsections (c), (d), (h), (i), (k), (*l*), (m), and (n) of th section shall apply to any foreign bank or company to which subsection (a) of secti 3106 of this title applies and to any subsidiary (other than a bank) of any su foreign bank or company in the same manner as they apply to a bank holdi company and any subsidiary thereof (other than a bank) under subparagraph (3) this subsection. For the purposes of this paragraph, the term "subsidiary" sh have the meaning assigned to it in section 2 of the Bank Holding Company Act 1956 [12 U.S.C.A. 1841].

(5) This section shall apply, in the same manner as it applies to any insured ba for which the appropriate Federal banking agency is the Comptroller of the Curr cy, to any national banking association chartered by the Comptroller of the Curr cy, including an uninsured association.